

1241.9.19(3)
54. d. 22. 2/3
AN
-3

E N Q U I R Y
INTO THE
USE and PRACTICE
OF
J U R I E S
AMONG THE
GREEKS and ROMANS;

From whence the Origin of the ENGLISH JURY
may probably be deduced.

IN THREE PARTS.

Σολωνα. δαλευνύλα τον δημον παυσαι κ; δημοκρατιαν καταστηται την πατριον κ;
δικαστηριον ποιησαντα εκ παντων. Aristot. Politic. lib. ii. c. 12.

In Præsidium innocentiae constituti Judices. Ciceron. Orat. pro P. Sylla ad fin.

Contra periculofissimas hominum potentias conditioni omnium civium providisse,
Judices, videamini. Id. pro Cælio.

By JOHN PETTINGAL, D. D.
Fellow of the SOCIETY of ANTIQUARIES of LONDON.

L O N D O N :

Printed for the AUTHOR, by W. and W. STRAHAN;

And sold by T. CADELL, (Successor to Mr. MILLAR) in the Strand.

MDCCLXIX.

H
156



P R E F A C E.

AS the Subject here offered to the Public is new, and perhaps was never before considered in the Light in which it now appears, it may seem necessary to make some Apology for hazarding private Thoughts in support of an Argument that differs from the Opinion hitherto received, and taken for granted even by the most learned. But be that as it may---What is here advanced, is an Enquiry proposed to the Erudition and Criticism of the learned Reader, What was the precise Signification of the Words *Δικασται* in the Greek Orators, and *Judices* in the Roman.

The common Acceptation of these Words, and the Idea generally annex to them, is that of *Presidents of Courts*, or, as we call them, *Judges*; as such they are understood by Commentators, and rendered by Critics. Dr. Middleton in his Life of Cicero expressly calls the *Judices*, *Judges of the Bench*: And Archbishop Potter, and in short all modern Writers upon the Greek or Roman

Orators, or Authors in general, express *δικασται* and *Judices* by such Terms as convey the Idea of *Presidents in Courts of Justice*. The Propriety of this is doubted of, and hath given Occasion for this Enquiry; in which is shewn, from the best Greek and Roman Authorities, that neither the *δικασται* of the Greeks, or the *Judices* of the Romans, ever signified *Presidents in Courts of Judicature*, or *Judges of the Bench*; but on the contrary, they were distinguished from each other, and the Difference of their Duty and Function was carefully and clearly pointed out by the Orators in their Pleadings, who were the best Authorities in those Cases, where the Question related to *Forms of Law* and Methods of Proceeding in judicial Affairs and criminal Process.

The Presidents of the Courts in criminal Trials at Athens, were the nine *Archons*, or chief Magistrates, of which whoever presided was called *ηγουμεων δικαστηρις*, or *President of the Court*. These nine presided in different Causes peculiar to each Jurisdiction. The Archon, properly so called, had belonging to his Department, all pupillary and heritable Cases; the *βασιλευς* or *Rex Sacrorum*, the chief Priest, all Cases where Religion was concerned; the *Polemarchus*, or General, the Affairs of the Army and all military

P R E F A C E.

v

military Matters; and the six *Theſmothetæ*, the other ordinary Suits.

Wherever then the *ανδρες δικασται* or *judicial Men* are addreſſed by the Greek Orators in their Speeches, they are not to be underſtood to be the *preſiding Magiſtrates*, but another Claſs of Men, who were to enquire into the State of the Cauſe before them, by Witneſſes and other Methods of coming at Truth; and after Enquiry made and Witneſſes heard, to report their Opinion and Verdict to the *Preſident*, who was to declare it.

The ſeveral Steps and Circumſtances attending this judicial Proceeding are ſo ſimilar to the Forms obſerved by our *Jury*, that the learned Reader, for ſuch I muſt ſuppoſe him, cannot doubt but that the Nature, Intent, and Proceedings of the *Δικαστηριον* among the Greeks were the ſame with the Engliſh Jury; namely, for the Protection of the lower People from the Power and Oppreſſion of the Great, by adminiſtring equal Law and Juſtice to all Ranks; and therefore when the Greek Orators directed their Speeches to the *Ανδρες Δικασται*, as we ſee in Demothe-
neſes, *Æſchines*, and *Lyſias*, we are to underſtand it in the ſame
Senſe

Sense as when our Lawyers at the Bar say, *Gentlemen of the Jury*.

So likewise among the *Romans*, the *Judices*, in their Pleadings at the Bar, never signified *Judges of the Bench*, or *Presidents of the Court*, but a Body or Order of Men, whose Office in the Courts of Judicature was distinct from that of the *Prætor* or *Judex Quæstionis*, which answered to our *Judge of the Bench*, and was the same with the *Archon* or *ἡγεμὼν δικάστηρις* of the *Greeks*: Whereas the Duty of the *Judices* consisted in being *impannelled*, as we call it, *challenged*, and *swore to try* uprightly the Case before them; and when they had agreed upon their Opinion or Verdict, to deliver it to the President who was to *pronounce* it.

This kind of judicial Process was first introduced into the Athenian Polity by Solon, and thence copied into the Roman Republic, as probable Means of procuring just Judgment, and protecting the lower People from the Oppression or arbitrary Decisions of their Superiors.

When the Romans were settled in Britain as a Province, they carried with them their *Jura* and *Instituta*, their

Laws

Laws and Customs, which was a Practice essential to all Colonies; hence the Britons, and other Countries of Germany and Gaul, learned from them the Roman Laws and Customs; and upon the Irruption of the Northern Nations into the Southern Kingdoms of Europe, the Laws and Institutions of the Romans remained, when the Power that introduced them was withdrawn: And Montesquieu tells us, that under the first Race of Kings in France, about the fifth Century, the Romans that remained, and the Burgundians their new Masters, lived together under the same Roman Laws and Police, and particularly the same Forms of Judicature *. How reasonable then is it to conclude, that in the Roman Courts of Judicature continued among the Burgundians, the Form of a *Jury* remained in the same State it was used at Rome. It is certain, Montesquieu, speaking of those Times, mentions the Paires or Hommes de Fief, *Homagers* or *Peers*, which in the same Chapter he calls *Juges*, *Judges* or *Jurymen* †: So that we hence see how at

* La loi des Bourguignons veut que chaque Bourguignon fut reçu en qualité de Hôte chez un Romain — De l'Esprit des Loix, liv. iii. c. 9. — Dans le commencement de la première (Race) il y avoit dans les villes à peu près la même administration que chez les Romains; les corps de Bourgeoisie, un Senat, de cours de Judicature. De l'Esprit des Loix, liv. xxx. ch. 11.

† Un des paires, ou homme de fief — Les juges ou paires. Id. liv. xxviii. ch. 27.

that Time the *Hommes de-Fief*, or *Men of the Fief*, were called *Peers*, and those *Peers* were *Juges* or *Jurymen*. These were the same as are called in the Laws of the Confessor *Pers de la Tenure*, the *Peers of the Tenure*, or *Homagers*, out of whom the *Jury of Peers* were chose, to try a Matter in dispute between the Lord and his Tenant, or any other Point of Controversy in the Manor. So likewise in all other Parts of Europe, where the Roman Colonies had been, the Goths succeeding them, continued to make use of the same Laws and Institutions, which they found to be established there by the first Conquerors. This is a much more natural Way of accounting for the Origin of a Jury in Europe, than having Recourse to the fabulous Story of Woden and his savage Scythian Companions, as the first Introducers of so humane and beneficent an Institution. This Disquisition makes the Third Part of this Tract.

As the Trial by Jury was founded in Liberty, and contrived both in the Grecian and Roman Polity, as a Guard and Protection of the lower People against the Power and arbitrary Judgments of their Superiors, the Reader perhaps will not be displeased to see by what Steps this Liberty was

was destroyed at the End of the Roman Commonwealth, and Despotism gaining Ground through all the Roman Empire, begun by the *Lex Regia* under Augustus, and thence by Means of the Civil Law, conveyed from Time to Time through all the Gothic Settlements, so as at last to eat out the Vitals of Liberty and its Companion a *Jury*, and establish arbitrary Power and the Will of the Prince in its Room.

This was the Case wherever the Civil Law was received into the Gothic Governments, which, with the Assistance of the Canon Law in latter Times, compleated that despotic Form of Government which prevails now in the greatest Part of Europe. It was upon this Account that our prudent Ancestors, at the Time that the Prince (Henry III.) claimed absolute Power, were upon their Guard not to admit it in any Shape into our Constitution or Polity; wisely foreseeing that if it was once to become any Part of the Law of the Land, the Despotism of the Prince would soon follow, and Liberty and upright Judgment give Way to the arbitrary and perhaps corrupt Decisions of the Prince or his Delegates; that if once the Civil Law, like a Serpent, got its Head into our Judicature, the whole Body would soon follow.

Hence it is that the Gothic Nations, which, under their own Laws and Institutions, derived from the happy Times of the Commonwealth of Rome, enjoyed equal Law and a popular Judgment, are now, by means of the Civil Law, at the Mercy of absolute Princes, and the arbitrary Decisions of their Emissaries.—England alone, with its Dependances, stands hitherto unmoved by all the Attempts made to introduce the Civil Law, and unshaken by all the Tempests raised against Juries and popular Judgments in those Reigns that had an evil Eye to the Liberties of the People. Here it is that the natural Rights of Mankind, that were forced to fly before the Face of Tyranny and the Sword of arbitrary Power, have sheltered the Storm, and found Refuge and Protection: Here it is that the scattered Remains of Roman and Gothic Liberty, cast out of the despotic States of Europe, are united, and make one venerable Body Politic, to remain a Monument to them of those Blessings they have lost, and a constant Lesson to us, to be thankful for the Happiness we enjoy under a virtuous Prince, who by the Principles of the Revolution, on which the Succession of the House of Hanover was built, is the declared Patron of equal Law, just Judgment, and legal Liberty.

As

As the Use and Practice of a Jury is discoverable in the Saxon, Salique, Ripuarian, and Burgundian Laws, which they had learned from the Roman Colonies that had been settled in the Countries they had over-run, and which the Conquerors enjoyed in common with the Conquered *, it has given Occasion to exhibit a short View of our Constitution, as founded in the feudal System, the Laws of which were the Origin of our unwritten Customs, called by the Name of the *Common Law*, by which the reciprocal Duties of the Governor and Governed were stated, the Right of Judicature settled in the Peers of the Tenure, or Homagers, (*paires, ou hommes de fief*) and the Liberty of the Tenant guarded against the Will and Pleasure or Invasion of the Lord of the Fee: Which wise Institution, beyond all Doubt, took its Rise, in the Northern Nations, as well as our own Country, from the Roman Manner of Judicature, by a Jury under the Republic, and which their Colonies had introduced into their Conquests.

Upon the whole, we may observe the venerable Antiquity and Excellence of our *Jury*, founded originally in the Nature of Man, with respect to the Rights of just and

* De l'Esprit des Loix, liv. xxx. c. 11.

equitable Judgment; admitted first by the Grecians, as Part of their Polity, imitated and improved by the Romans, under their Republic, and propagated through Europe by their Conquests and Colonies; so that equal Justice and Judgment, after being in Possession of almost all the civilized Parts of Europe, but now driven out by Despotism and absolute Power, have at length fixed their Tribunal in its highest Perfection among us *only*, and made the judicial Constitution of England at once the Envy and Admiration of the rest of Europe.

By way of enlivening a Subject, which perhaps may not be to the Taste of every Reader, there are interspersed some critical and philological Observations, which will throw a new Light on some ancient Customs and Signification of Words relative to the present Argument.

Upon the whole, the Greek and Roman Writers, the Orators especially, will be read with greater Precision and Exactness, when it is known that the *Judices* of the one, and the *Δικασται* of the other, related not to the *Judges of the Bench*, or *Presidents of Courts*, but to what we call a *Jury*. In this View, the Reader will see the Propriety

of the several Terms, Ceremonies, and Customs, when applied to them, which hitherto have passed unnoticed, because they have been misunderstood to belong to the Presidents. He will be pleased to find the glorious Characteristic of this Nation, a *Jury*, to be originally founded in the Liberty of Greece, and handed down to us through the Channel of the Commonwealth of Rome, and the Colonies planted in their Conquests. He will feel a secret Satisfaction, when he observes that the Constitution of an English Jury is at this Day *the best*, and perhaps *the only Comment* that can explain the Nature and Ceremonial of judicial Process in criminal Cases, mentioned in these Orators. He will likewise reflect, that the Commentators upon those Writers, who do not distinguish the *Δικασται* from the Archon, the *Jury* from the *Judge*, and confound the Circumstances and Character peculiar to the one, with the Properties and Forms belonging to the other, can never be said to understand the Authors themselves, or be able to make them to be understood by others. But if we compare the Greek *δικασται* and the Roman *Judices* with an *English Jury*, we shall find the Forms and Ceremonies attending each to be nearly the same, allowing for the Difference of an Athenian and Roman from an English Government; and that the chusing

ing them upon every Cause, the Challenge, the Oath of Office, Consultation, and Verdict, did not, could not belong to the presiding Magistrate, but to an Institution of a Body of Men provided by the State to enquire into the Rectitude or Obliquity of an Action, and to make their Report, for Acquittal or Punishment; all which will be seen more at large in the Tract itself, which will supply abundant Proof of the Distinction between the *Δικασται* or *Judices*, and the Presidents of the Courts in Greece and Rome; and that the first, with regard to the Intent and Design of their Institution, Duty, and Forms of Proceeding, acted upon the same Principles as our Jury.

This being the Plan of the following Tract, it is submitted with great Deference to the Judgment and Candour of the learned Reader, who, if he thinks he meets with any Over-sight or Mistake in the Conduct of the Argument, is desired to consider how liable a Traveller is to go a little out of his Way in a strange Road, where he has no Path to follow.

*Nullius ante
Trita solo.*—

The Novelty of the Subject, it is therefore hoped, will be an Excuse for any Errors, if such be found, in the Management of it; and the candid Reader will give all reasonable Allowance to the *first* Arrangement of such a Variety of Materials, which never were brought into one Structure before, or ever found themselves in so near a Situation to each other. However, if after the Perusal of what is here presented him, he finds any Information or Entertainment, it is hoped he will not think his Time entirely lost or misspent.

ing them upon every Cause, the Challenge, the Oath of Office, Consultation, and Verdict, did not, could not belong to the presiding Magistrate, but to an Institution of a Body of Men provided by the State to enquire into the Rectitude or Obliquity of an Action, and to make their Report, for Acquittal or Punishment; all which will be seen more at large in the Tract itself, which will supply abundant Proof of the Distinction between the *Διαιτητα* or *Judices*, and the Presidents of the Courts in Greece and Rome; and that the first, with regard to the Intent and Design of their Institution, Duty, and Forms of Proceeding, acted upon the same Principles as our Jury.

This being the Plan of the following Tract, it is submitted with great Deference to the Judgment and Candour of the learned Reader, who, if he thinks he meets with any Over-sight or Mistake in the Conduct of the Argument, is desired to consider how liable a Traveller is to go a little out of his Way in a strange Road, where he has no Path to follow.

*Nullius ante
Trita solo.*——

P R E F A C E.

xv

The Novelty of the Subject, it is therefore hoped, will be an Excuse for any Errors, if such be found, in the Management of it; and the candid Reader will give all reasonable Allowance to the *first* Arrangement of such a Variety of Materials, which never were brought into one Structure before, or ever found themselves in so near a Situation to each other. However, if after the Perusal of what is here presented him, he finds any Information or Entertainment, it is hoped he will not think his Time entirely lost or misspent.

ERRATA.

Page 6.	line 24.	read <i>jussæ</i> instead of <i>justæ</i> .
8.	5.	for <i>St. Amand</i> , read <i>St. Amand</i> .
9.	17.	read <i>Remonstrance</i> .
17.	2.	read <i>inlustrior</i> .
26.	22.	for <i>as</i> , read <i>or</i> .
39.	5.	for <i>chuse</i> , read <i>chose</i> .
48.	18.	for <i>swear</i> , read <i>swart</i> .
63.	4.	read <i>Leocrates</i> .
66.	18.	for <i>of</i> , read <i>which</i> .
81.	22.	for <i>Edward</i> , read <i>Henry</i> .
82.	11.	dele <i>fac and fake and</i> .
88.	11.	note, for <i>possident</i> , read <i>possidet</i> .
108.		at the Bottom, instead of, <i>this first Philippick</i> , read in <i>Cicero's</i> <i>Orat. pro Plancio</i> .
120.	4.	read <i>confidere</i> .
128.	6.	dele <i>grand</i> .
147.	19.	for <i>thither</i> , read <i>hither</i> .
150.		in the note, for <i>Σελων</i> , read <i>Αναχαρισ</i> .
151.	3.	for <i>in</i> , read <i>into</i> .
160.	8.	read, <i>to the odd Number</i> .
170.	7.	for <i>Jurymen</i> , read <i>Juryman</i> .
179.	11.	for <i>obeiis</i> , read <i>sociis</i> .
184.	14.	read <i>decuratio</i> .
189.	note,	read <i>fide jussorem</i> .
		for <i>eum</i> , read <i>cum</i> .

AN
ENQUIRY
INTO THE
USE and PRACTICE of JURIES
AMONG THE GREEKS, &c.

THE Privilege that every Englishman enjoys of having his Person and Property so far secured, that no Injury under Pretence of Law can be done to one or the other, but by the Consent and Approbation of Twelve Men of his own Rank, is the greatest Happiness that can belong to a Subject, and the most valuable Blessing that can attend Society; for by these Means, the Poor stands in no Fear of Oppression from his Governor or powerful Neighbour, and the Hands of the Great are tied up from disturbing the Public by making Inroads upon the Ease and Property of Individuals below them—So that the Powers of each in their respective Stations, are hereby happily directed to carry on one and the same End, the Peace, Order, and good Government of the Whole.

This Institution of a *Jury* does not seem to have been the Growth of any one Place, or founded in the Genius or peculiar Mode of Government of any particular People; but to be the fair Offspring of

natural Justice, and the Result of Humanity and Tenderneſs in diſpoſing of the Life and Property of Individuals; which appeared even in the ancient civilized Nations in Proportion to the Senſe they had of Liberty, Equity and Fortitude. I ſay *Fortitude*, becauſe Aristotle ſeems to conſider *that* Diſpoſition of the Mind as the natural Foundation and firſt Principle of Liberty, and therefore obſerves, “ that the
“ cold European Nations, having greater Courage and Strength of Body
“ than Mind, were, for the moſt Part, *a free People*; whereas the
“ Aſiatics, who were endued rather with the Accompliſhments of
“ the Mind than the Powers of the Body, had *more Ingenuity but leſs*
“ Courage, and therefore always lived in Slavery under arbitrary Power.
“ But the Greeks by their Situation being placed between theſe two Ex-
“ tremes, partook of the Excellencies of both, being a free People, by
“ their Spirit and Courage, and well ſkilled in the Arts of Government
“ by their Acutenefs and Underſtanding *.”

How far this Compliment to his Country was true I ſhall not inquire, but applaud his Patriotiſm. However, certain it is, that the Northern European Nations have always breathed the Spirit of Valour and Liberty, while the Aſiatics and other Natives of the warmer Climates, have ever lived under Oppreſſion and Tyranny: And it is remarkable, that their Country hath always been repreſented as the Soil where we are to look for the Origin of Deſpotiſm from the earlieſt Times †; all

* Τα γὰρ ἐν τοῖς ψυχροῖς τοποῖς ἐβη καὶ περὶ τὴν Εὐρώπην, θυμὸν μὲν ἐστὶ πλὴρὴ διανοίας, ἐνδεδεστέρα καὶ τέχνης, διόπερ ἐλευθερὰ μὲν διατελεῖ μάλλον, ἀπολιτευτὰ δὲ, καὶ τῶν πλεονέκτων ἀρχεῖν καὶ δυνάμενα.—Τὰ δὲ περὶ τὴν Ἀσίαν, διανοητικὰ μὲν, καὶ τεχνικὰ τὴν ψυχὴν, ἀθυμὰ δὲ, διόπερ ἀρχομένα καὶ δουλευοῦντα διατελεῖ, τὸ δὲ τῶν Ἑλλήνων γένος ὥσπερ μεστέυει κατὰ τῆς τοπικῆς, ὥτως ἀμφοῖν μετεχει—καὶ γὰρ ἐνθυμὸν καὶ διανοητικόν, ἐστὶ διόπερ ἐλευθερόν τε διατελεῖ, καὶ βελτίονα πολιτευόμενον, &c. Aristoteles Πολιτικ. lib. vii. c. 7.

† 1 Samuel, chap. viii. ver. 10. to 18.

which was probably owing to Plenty, Indolence and Luxury, which generally are the Effects of warm and enervating Climates.

What was thus at first the Effect of Equity and a tender Regard to the Life and Property of Man as a Dictate of Nature, improved perhaps by Climate and Constitution, by Degrees became extended and enlarged by such salutary Additions, as to grow into a fundamental Principle in the Constitution of several States; and it is observable, that where this Method of Trial *by many* in any degree obtained, there public Liberty was cherished; which is the Reason why we never find this Institution in any despotic Government either antient or modern; for indeed, how could the deliberate and free Judgment of *many* be admitted in this Case, in a State where every Thing else was determined by the absolute Will of *One*.

This likewise I apprehend to be the Reason why the Gothic Model of Government in Europe by Degrees disappeared as the Civil Law prevailed; for the Civil Law was as it were the Harbinger of arbitrary Power, and where it was admitted, it paved the Way for absolute Government, and overturned all the Bulwarks of Liberty that had been introduced by feudal Establishments. This likewise was the Reason why the Canon Law (great as the Dislike was at first between them) came at last to adopt in some Cases the Maxims of the Civil Law, because the Papal Encroachments in the Church could not have a better Basis and Foundation than those Laws, which were calculated to eat out and consume the Civil Liberty of the State*. It was from Apprehensions of this Junction that our Ancestors made that noble Stand against the formal Admission of the Civil Law, in any

* Pontificiis canonibus inde desumptis. Selden. ad Fletam.

Shape or in any Case into our Constitution; for when the Bishops would have introduced the Legitimation of Bastards, grafted on the Civil Law, if the Parents should afterwards be married to each other, what said the Barons una voce at the Parliament of Merton, 20 Hen. III. *Nolumus leges Angliæ mutare*, We will not change the Laws of England *. Very justly said, and why? Because this Innovation (whether proper or not in other respects, I shall not stay to enquire) would introduce the Maxims and Practice of the Civil Law into this Kingdom, which they plainly saw from this Beginning would insinuate itself farther, so as in Time to eat out the Vitals of our Common Law, and settle itself in its Place: The Consequence of which would be, that the Civil Law once obtaining here, our Politics would be influenced by the Spirit of that Law, and our Liberty and venerable Constitution soon give way to Despotism and arbitrary Power. Such was the noble Stand in behalf of Liberty made so long ago as the 20 Hen. III. one of the most despotic Reigns in our Histories.—It is to be observed here, that the Bishops proposed the Admission of the Civil Law in this Case, because it had been already received by the Canon Law; and if it could once find its Way into our Jurisprudence, our whole Constitution would have been changed into the arbitrary Power of the Prince, seconded by the Decisions of the Clergy, who were then not only the Ministers of State, but the Judges on every Bench, and the Advocates at every Bar †. But after all the Attempts of the Clergy to make the Civil and Canon Law the Municipal Law

* Et rogaverunt omnes Episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia Ecclesia habet pro legitimis; et omnes Comites et Barones una voce responderunt, Quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ. *Statut. Merton*, cap. 9.

† Nullus clericus nisi Causidicus Guliel. Malmesburiens.

of this Country, Liberty and the Laws of England got the better about the Beginning of Edward III. from which Time the Attention to the Civil Law ceased as the Study of the Common Law gained ground, Seld. ad Flet. c. 9. When therefore they endeavoured the Establishment of the *Civil Law*, it was only a Pretence to introduce the *Canon Law*, and under the arbitrary Maxims of one, in Matters of Civil Government, to settle a spiritual Tyranny in the Church by the other: So that Selden observes, that when the Lords in the Case above rejected the Civil Law, they at the same Time declared against the Canon Law, and said, *Nolumus leges Angliæ mutare legibus Cæsareis, seu quod idem est pontificiis canonibus inde desumptis. We will not change the Laws of England for the Civil Law, or, which is all one, the Canon Law derived from thence; for the Intention and Spirit of both Laws tended to one and the same End, the Introduction of arbitrary Power in Church and State. This mutual Connection and Support of each other, Selden compares to the Serpents that twine about each other on the Caduceus of Mercury*.*

It was probably on this same Account that King Stephen by the Advice of his Council forbad, by publick Edict, the retaining the Laws of Italy brought into England, as we are told in the Preface of Coke's Reports, lib. viii. out of Bacon; and John of Salisbury, temp. Hen. II. lib. viii. c. 22. de nugis Curialium, says, *Alios vidi qui legis libros deputant igni, nec scindere verentur si in manus eorum pervenerent Jura vel Canones. Tempore regis Stephani a regno justæ sunt leges Romanæ quas in Britanniam Domus venerabilis Patris Theobaldi Britanniarum Primatis asciverat—Ne quis etiam libros retineret edicto regio prohibitum est, et Vaccario nostro indictum Silentium; sed Deo*

* Seld. ad Flet. velut fere angues invicem Caducei Mercurialis complicantur—

faciente eo magis virtus legis invaluit, quo eam amplius nitebatur impietas infirmare—Where we may observe, that he speaks of the Insult offered to both Laws *Jura et Canones*, but by *Deo faciente* and the *impietas* here mentioned, he has been thought to intend the Canon Law only, which God so far protected, as to disappoint the Designs of the wicked.

It is to be confessed, that this is very much the Language of those at that Time that spoke of the Canon Law as almost divine. But by Bacon calling them above the *Laws of Italy*, which Sarisburiensis calls *Leges Romanæ*, it is most probable that they were understood to be the Civil Law, because *Leges Italiæ* could not be so properly applied to the Canon as to the Civil Law, especially as they related more immediately to a *Country*, *Italiæ*; which could not with the same Propriety be said of the Laws of the Church.

In the close Roll, 19 Hen. III. there is the following Order; Major et Senatus per totam civitatem London. clamari faciant et firmiter prohiberi, ne aliquis Scholas regens de Legibus, in eadem civitate de cetero ibidem leges doceat, et si aliquis fuerit hujusmodi Scholas regens, ipsum sine dilatione cessare facient. Test. R. apud Basing. 11 Die Decembris*. Now this Circumstance of teaching Laws in Schools, seems to fix the Meaning of the Laws here mentioned to the Civil Law, because these were taught in Schools at that Time; but we never read of Schools of the Canon Law, at least so early.

It is to be observed, that this Order to the Mayor and Corporation of London to prohibit Schools of Law was the Year before the Statute of Merton abovementioned, which was the 20 Hen. III.—From

* See Selden's Review about Tithes, at the End.

whence we may fairly conclude, that the Laws forbidden to be taught by Order of the King and Council, were the same Laws, that is, the Civil Law, which the Year after was opposed and rejected by Parliament. We see likewise this same Spirit declaring against the Admission of the Civil Law, in Matters before the Judicatory of Parliament in the despotic Reign of Richard II. In the eleventh Year of that King's Reign, when the Lords Appellants demanded Judgment, the King and his Ministers joined the Professors of the Civil Law (as favourable perhaps to the King's arbitrary Pretensions) to the common Lawyers, to be Counsellors in the Appellants Case before the Parliament—a *quels temps les Justices et Sergeants et autres Sages du Loi de roialme et auxint les Sages de la Ley Civil furent charges par le Roy de donner leur loial Conseil, &c. says the Record **. By whom it was answered, that the Appeal was not laid according to the Order that was required by the one Law or the other, i. e. the Common or Civil Law.—*Disoient que mesme l'appele ne fust pas fait ne afferme solonque l'Ordre que l'une loy ou l'autre requireit. Upon which the Lords resolved—That it was their undoubted Right, that this Cause should be tried according to the Law, Course and Custom of Parliament, seeing that the Kingdom of England never was in Times past, or as far as the King and Lords of Parliament could prevent it, ever should be in Time future, ruled or governed by the Civil Law;—Pur ce que le roialme d'Engleterre netoit devant ces heures, ne al' entent du Roi notre Seigneur et Seigneurs du Parliament unques ne fera rule ne gouverne par la ley Civil.*

Whence could all these Jealousies of the Civil Law arise from Time to Time in the Parliament; Whence could all these Declarations

* Rot. Proceff. et Jud. 3 Feb. 11 Ric. II.

against, and Prohibitions of it proceed, but from the Considerations of its Maxims being destructive of Civil Liberty, too favourable to arbitrary Government, and diametrically opposite to the Laws, Constitution and Freedom of this Nation; and it was from this Tendency, that it was forbid in Spain to be read on Pain of Death. St. Amaud's Essay on the Legislative Power of England, p. 46.

This Tendency of the Civil Law to root out Liberty and establish arbitrary Power in the Prince, was the Inducement to some of our Kings to try to introduce the Civil Law for that Purpose, as we are told by Fortescue.—*Satagentes proinde leges Civiles ad Angliæ regimen producere* *. We are likewise told by Selden † that Grosstete, Bishop of Lincoln, wrote a Treatise by way of Letter to Walter de Raleigh, Chief Justice of the King's Bench, desiring he would give his Assistance to have the Law of England changed for the Civil Law in the Case of Bastardy before mentioned, at the Parliament of Merton; and Sir Edward Coke, 3d Institute, observes, that William de la Pole, Duke of Suffolk, in the Reign of Henry VI. endeavoured to get the Civil Law established here, as a Measure suitable to absolute Government, which was the Occasion of Fortescue, Chief Justice, writing his Book *De laudibus legum Angliæ*, in Defence and Support of the *Laws of England*, against the ministerial Attempts of that Reign to introduce arbitrary Power in the Crown by Means of the Civil Law.—And here I shall desire the learned Author of *Observations on the Statutes lately published*, to review a Conjecture of his, viz. that this Proposal of introducing the Civil Law was owing to the Poictevin Favourites of Henry III. and that the unanimous rejecting it was, *Because Foreigners should not have any Direction of us and our*

* Fortescue *de laudibus legum Angliæ*, cap. 33.

† *Ad Fletam*, c. 9.
Laws.

USE AND PRACTICE OF JURIES, &c. 9

Laws. Whereas in fact the Opposition made to the Instance of the Bishops, relating to the Admission of the Civil Law into this Nation, was owing to the Apprehension, that it had a Tendency to establish an undue Power in the Prince; whereas the Common Law of the Land, (*huc usque usitata et approbata*) hitherto in use and approved of, was founded in Principles of Liberty, and a Check to that Despotism that was cherished and encouraged by the Civil and Canon Law. We have thus far seen what spirited Opposition was made to the Admission of the Civil Law into the political Government of this Kingdom, and for what Reason; how far it was seasonable, appears from what followed in other Countries, where the Civil Law was received; for in Proportion as that got into use, the accustomed Law of the Country was laid aside, and arbitrary Power succeeded in the Place of Liberty. The Truth of this is discoverable in most States of Europe of the Gothic Foundation, but no where more than in Spain, where the Constitution was originally of the Gothic Model, and continued almost entire even to the Time of Charles V. The Remonstrances presented to him at the Time of the Rebellion * shews, that the Constitution of Spain at that Time was well nigh the same with that of England at present; and the Cortes of that Kingdom and the Parliament of England resembled each other in their component Parts, Principles and Privileges so much, that one cannot but be surprized to see such Traces of Liberty and Independency among them in the Beginning of the 16th Century, 250 Years ago, and now nothing but the most abject Submission, without even a Wish to be set free. The same Change may be observed in France and other Kingdoms of Europe, where the Civil Law obtained; they lost their Freedom, and the Gothic Laws and Gothic Liberty died together, and gave way to the

* Sandoval. Hist. of the Civil Wars of Spain, lib. iv. sect. 2.

Roman Law and the absolute Will of the Prince, which appeared there first without Disguise in the Reign of Lewis XI.

When I say *Roman Law*, I do not mean *that* which was in use during the Times of the Common Wealth before Augustus, when the Civil Law was founded in good Morality for the Defence and Protection of the Public and Individuals, the whole and its Parts; but I mean that horrible System of Law, which grew up and branched into various Evils after the famous *Lex Regia* in the 6th Year of Augustus, and U. C. 731. which Period was the End of Liberty, and the Beginning of that Despotism, which has caused so much Ruin and Devastation in Europe ever since.

The *Lex Regia itself* is not extant; but by the Grant of the same Powers to Vespasian that had been given by this Law to Augustus, Tiberius and Claudius, we can easily discover the absolute Power that was vested by this Law in the Emperors, and by them carried from Time to Time wherever they pushed their Conquests.

The following Inscription, now remaining in the Lateran, contains a Fragment of the *Lex Regia* in favour of Vespasian:

FOEDVSVE. CUM. QVIBVS. VOLET. FACERE. LICEAT. ITA.
VTI. LICVIT. DIVO. AVG. TI. IVLIO. CAESARI. AVG. TI-
BERIOQVE. CLAVDIO. CAESARI. AVG. GERMANICO.

VTI QVE. EI. SENATVM. HABERE. RELATIONEM. FACERE. REMIT-
TERE. SENATVS. CONSVLTA. PER. RELATIONEM. DISCESSIO-
NEMQVE. FACERE. LICEAT. ITA. VTI. LICVIT. DIVO. AVG. TI.
IVLIO. CAESARI. AVG. TI. CLAVDIO. CAESARI. AVG. GERMA-
NICO.

VTI-

VTIQUE. CVM. EX. VOLVNTATE. AVCTORITATEVE. IVSSV. MANDATVVE. EIVS. PRAESENTEVE. EO, SENATVS. HABEBITVR. OMNIVM. RERV. IVS. PERINDE HABEATVR SERVETVR. AC SI E LEGE. SENATVS. EDICTVS. ESSET. HABERETVRQVE.

VTIQUE. QVOS. MAGISTRATVM. POTESTATEM. IMPERIVM. CVRATIONEMVE. CVIVS. REL. PETENTES. SENATVI. POPVLOQVE. ROMANO. COMMENDAVERIT. QUIBVSQVE. SVFFRAGATIONEM. SVAM. DEDERIT. PROMISERIT. EORVM. COMITIS. QVIBVSQVE. EXTRA. ORDINEM. RATIO. HABEATVR.

VTIQUE. EI. FINES. POMERII. PROFERRE PROMOVERE. CVM. EX REPUBLICA CENSEBIT. ESSE LICEAT. ITA. VTI. LICVIT. TI. CLAVDIO. CAESARI. AVG. GERMANICO.

VTIQUE. QVAECVNQVE. EX. VSV. REIPUBLICAE. MAIESTATE. DIVINARVM. HVMANARVM. PVBLICARVM. PRIVATARVMQVE. RERV. ESSE CENSEBIT. EI. AGERE. IVS. POTESTASQVE. SIT. ITA. VTI. DIVO. AVG. TIBERIOQVE. IVLIO. CAESARI. AVG. TIBERIOQVE. CLAVDIO. CAESARI. AVG. GERMANICO. FVIT.

VTIQUE. QVIBVS. LEGIBVS. PLEBEIVE. SCITIS. SCRIPTVM. FVIT. NE. DIVVS. AVG. TIBERIVSVE. IVLIVS. CAESAR. AVG. TIBERIVSQVE. CLAVDIVS. CAESAR. AVG. GERMANICUS. TENERENTVR. IIS. LEGIBVS. PLEBISQVE. SCITIS. IMP. CAESAR. VESPASIANVS. SOLVTVS. SIT. QVAEQVE. EX. QVAQVE. LEGE. ROGATIONE. DIVVM. AVG. TIBERIVMVE. IVLIVM. CAESAREM. AVG. TIBERIVMVE. CLAVDIVM. CAESAREM. AVG. GERMANICVM. FACERE. OPORTVIT. EA. OMNIA. IMP. CAESARI. VESPASIANO. AVG. FACERE. LICEAT.

VTIQUE. QVAECVNQVE. ANTE. HANC. LEGEM. ROGATAM. ACTA. GESTA. DECRETA. IMPERATA. AB. IMPERATORE. CAESARE. VESPASIANO. AVG. IVSSV. MANDATVVE. EIVS. A QVOQVE.

SVNT. EA PERINDE. IVSTA. RATAQ. SINT. AC SI. POPVLI. PLE-
BISVE. IVSSV. ACTA. ESSENT.

S A N C T I O.

SI QVIS. HVIVSCE. LEGIS. ERGO. ADVERSVS. LEGES. ROGATIONES.
PLEBISVE. SCITA. SENATVSVE. CONSVLTA. FECIT. FECERIT.
SIVE. QVOD. EVM. EX. LEGE. ROGATIONEVE. PLEBISVESCITO.
S. VE. C. FACERE. OPORTEBIT. NON. FECERIT. HVIVS. LEGIS.
ERGO. ID. EI NE. FRAVDI. ESTO. NEVE. QVIT. OB. EAM. REM.
POPVLO. DARE. DEBETO. NEVE. CVI. DE. EA. RE. ACTIO. NEVE.
IVDICATIO. ESTO. NEVE. QVIS. DE. EA. RE. APVD. SE. AGI.
SINITO.

E Gruteri Inscript. Tit. Cæsarum Imperatorumque,
p. 242. et Briffon, de formulis, lib. ii. p. 154.

The Power here granted in this Fragment to Vespasian was the same given to the former Emperors there mentioned by the Lex Regia; and altho' the Inscription is not entire, we may see by what remains, that the Authority there committed to the Emperor, tho' but a Part of what we may suppose was contained in the whole Law, yet partial as it is, it was too much to be trusted to the Management and Discretion of any human Heart.

Let us hear Justinian, Institut. Tit. 2. sect. 6. after enumerating the several known Names the Roman Laws were called by according to the Authority by which they were passed, such as Lex Plebiscitum, Senatus Consultum, &c. he adds—sed quod et Principi placuit Legis habet vigorem, quum lege regia quæ de imperio ejus lata est Populus ei et in eum omne imperium suum et potestatem concedat; *Quodcunque ergo, Imperator per Epistolam constituit vel cognoscens decrevit, vel Edicto præcepit, Legem esse constat*; Hæc sunt quæ Constitutiones appellantur.

It is to be observed, that these Words are not to be understood as the Description given by Justinian himself, but they are borrowed by him out of Ulpian in Digest. Tit. de Constitut. Principis, where the Words are to be seen as a Gloss on the *Lex Regia*; whereby it was declared, in total Breach of the antient Constitution, and Subversion of natural Right as it stood under the Common Wealth, that from thenceforth all Power which before was in the People was conferred on and vested in the Emperor, whose Will and Pleasure was not only to be *Law*, but the *only Law*.

By way of further Explication, it is added in this Law in favour of Vespasian, that he was to be *Legibus Solutus*; the Meaning of which Expression we cannot better understand, than from the Roman Lawyers, and Cicero himself at the Head of them, who speaking of Q. Metellus Pius, says, *Quid tam singulare, quam ut Senatus Consulto, Legibus Solutus Consul ante fieret, quam ullum alium Magistratum per leges capere licuisset* *. Whence we learn, that *Legibus Solutus* signified being dispensed with, or not bound by particular Laws. So when Augustus, and after him Vespasian, was said by this Law to be *Legibus Solutus*, he was understood not to be bound by those Laws that former Magistrates were governed by.

Zonaras in his Life of Augustus takes notice of this Particular, that *He was exempted from the Obligation of Law*; i. e. says he, *He was free from all Restraint of Law, and subject to none* †. This new Prerogative conferred on the Chief Magistrate implies, that it was unknown in that State before, where the Supreme Governor, whatever Name he

* Pro lege Manilia.

† — Προσεται και λελυθαι των νομων εδωθη αυτω τωτ' εστιν, ελευθερον απο πασης των νομων αναγκης ειναι και μεδενι τωτων ανηχεσθαι. Zonaras de Augusto.

bore under the different Modes of Government, and even the first Kings after the Foundation of Rome were made responsible to the Laws. Tacit. Annal. 3. says, *Servius Tullius Sanctior Legum fuit, quibus etiam Reges obtemperarent*; and the Reason for this Regulation seems to have been, the undue Exertion of arbitrary Power by the Prince, which in the Infancy of the City and State had been assumed and exercised by Romulus, as we learn from the same Author—*Nobis Romulus ut libitum imperitaverat*. The ill Consequences that might arise from this Example at the Beginning, probably made it necessary to provide early by Law against the Extravagancy of Royal Will and Pleasure; and indeed this is such a natural Principle of Self-Defence, that we every now and then see it peeping out even under the worst of Times among ourselves. Our own Bracton, tho' in other Respects complaisant enough to kingly Power, under the Reign of Henry III. when the Claim of Prerogative ran very high, was obliged to own that the King of England, great as he is, has two Superiors in his Kingdom, God and the Law. The King, says he, *ought not to be under Man, but under God and the Law, because it is Law that makes the King. Let therefore the King acknowledge in the Law, that which the Law bestows on him, i. e. Sovereignty and Dominion; for he is not a King that rules by his Will and Pleasure, but only where he governs according to Law* *. This was the avowed Law of the Land—*hucusque usitata et approbata*, as the Barons una voce declared upon another Occasion at the Parliament of Merton. This constitutional Doctrine, *Lex facit Regem*, and, *non est Rex ubi dominatur voluntas et non Lex*, shews us that our Ancestors thought, that a King forfeited all Right to that Name and Authority as soon as he acted by Will and

* Ipse Rex non debet esse sub Homine, sed sub Deo et Lege; quia Lex facit Regem; attribuat igitur Rex legi, quod Lex attribuat ei, viz. Dominationem et imperium; non est enim Rex ubi dominatur Voluntas, et non Lex. Bracton, lib. i. c. 8.

Pleasure in Opposition to Law—And that this was the *first Principle* of Government among the Athenians, and indeed every free State, we learn from Demosth. c. Meid. p. 98. Edit. Taylor. The Thesmothetes, says he, is not simply a Name of a Man, but a Name that belongs to the State, which is delegated to him that bears it with Powers of Government and Magistracy—Ο γὰρ θεσμοθετης υδενος ανθρωπων εστι ονομα αλλα της πολεως—That is, As long as he fills that Character according to the Intent with which he was invested with it, he is the *Thesmothetes*; but wherever he fails in that, he sinks again into the private Man.—In like Manner, a *King* is not a Name that any Man has a natural Title to, it is given him by Law: as long therefore as he executes that Name and Character according to Law, he is *King*, and no longer—Non enim est Rex ubi dominatur Voluntas et non Lex. Again, lib. 3. de actionibus, cap. 9. sect. 3. he says, Nihil aliud potest rex, in terris, cum sit Dei Minister et Vicarius, nisi id solum quod de Jure potest—*No King upon Earth as the Minister and Representative of God has Power to do any Thing but by Law.* This was our ancient Constitution, and I trust ever will be to latest Posterity. But to return to the Lex Regia; besides the despotic Power vested by that Law in the Prince, Appian observes, that it was designed to be perpetual; for as heretofore all the Magistrates were annually chose, so by this Law, the Prince once invested needed no more *Election, Choice, or any new Delegation of Authority* *. Accordingly it became hereditary in his Family.

This Madness of the People, which had such a rapid Beginning in the Time of Augustus as to pass the *Lex Regia*, grew to such a Height by the Time of Tiberius, that forgetful of the Sweets of Li-

* — υδεν αιρεσεως, η χειροτονιας, η προσωπιματος επι δεησεις Appiani Histor. επιφιλ. α ad init.

berty that they had been born under, and their Ancestors had sacrificed their Lives for, the Chief Men among them strove who should be the most forward in the Surrender of them; so that Tiberius, arbitrary as he wished to be, felt more for them than they did for themselves, and could not help detesting such vile Adulation. When going from the Senate he used frequently to say—

O Homines ad Servitutem paratos *—*How ready are these Men for Slavery—*

Upon the Discontinuance or rather Decay of this excellent Institution of being tried by the Suffrage of many reputable and indifferent Men, which was the original Meaning of *Judicia*, the Romans experienced the most dreadful Consequences of arbitrary Power, when they saw their Lives and Fortunes at the Mercy of the Prince as their Judge, his Informers, their Accusers, and Assessors composed of such, *quibus omnia Principum honesta atque inhonesta laudare mos est*, as Tacitus says, *Men that were ready to approve every Thing done by the Prince, whether right or wrong.* Such *Vermin* ripened in the Sunshine of a Court have been the Produce and Pest of every Age and Nation under Despotism ever since. I call them *Vermin*, because that Word seems best to describe those who are called by Demosthenes c. Meid. τὰς φθιπύνας πρὸς τὰς πλεονεξίας, *those that creep to great Men*; and Tacitus uses perhaps from this Authority the Expression *irrepentibus Dominationis Ministris*, the creeping Ministers of Power. Histor. lib. ii. de Vitellio Victore; and of Hispon. lib. i. annal. he says, *Sævitiæ Principis adrepsit*; by which Image is represented the servile, groveling Disposition, that fawns and flatters the Power and Arrogance of their Superiors. And to rivet these Chains that they had forged for themselves, the same

* Tacit. Annal. lib. iii.

Annalist says of this Period—*Romæ ruere in Servitium, Consules, Patres, Eques, quanto quis in lustrior tanto magis falsi et festinantes; At Rome all Degrees of Men strove who should be the foremost to submit to Slavery, and those who were the most honourable were in this Respect the most infamous.* Who can bear with any Degree of Temper to read that Declaration from the Mouth of an old Roman to his Prince—*Tibi, Cæsar, summum rerum judicium dii dedere, nobis obsequii gloria relicta est.* Tac. Annal. lib. vi. *Sir, the Gods have invested you with absolute Power, but still have left us the Honour and Glory of Obedience.* But however offensive this may appear from the Mouth of a Roman, yet we must not forget that it was the Language in Britain not long ago.—What prepared the Way for this blessed State of Things, was the unhappy Disposition Augustus found the People intired out with the Miseries attending Civil Wars, and ready to embrace Peace and Quiet on any Terms. This the artful Prince improved to his own Advantage, and under the Powers granted by the *Lex Regia*, we are told by Tacitus, *he encroached by Degrees upon the Authority of the Senate, Magistrates and even the Law itself, without Opposition; for the old Republicans for the most Part had been taken off either by the Wars or Proscription, and the Rest of the Nobility were distinguished with Places or Pensions, in Proportion as they were assisting in establishing the Despotism of the Prince; so that thus feeling the Comforts of their new Situation, they were induced to choose Slavery with Ease and Opulence, rather than the Recovery of their former Liberty with Difficulties and Danger*.*

* — *insurgere paulatim, munia Senatus, magistratuum, legum in se trahere, nullo adversante cum ferocissimi per acies aut proscriptione cecidissent, cæteri nobilium quanto quis servitio promptior, opibus et honoribus extollerentur; ac novis ex rebus aucti, tuta et presentia, quam vetera et periculosa mallent.* Tacit. Annal. lib. ii.

If we had not this Account of the Causes of this extraordinary Appearance, one would have been tempted to ask, how they who a very few Years before had put Julius Cæsar to Death for seeming to take Steps that led towards Tyranny and despotic Power, should so easily give up their Liberty to Augustus, and establish Slavery by Law: But we see Tacitus accounts very reasonably for this sudden Alteration in their Politics; for being tired with the Disorders and Confusion that attended the Civil Wars, they chose to be at Ease and Quiet under an absolute Prince, rather than contend precariously for Liberty, and undergo the Violences attending popular Dissentions *. And as human Nature always acts uniformly upon the whole, so we have seen in the History of our own Country, the very same Effects arising from the same Causes. After the Restauration of Charles II. which was preceded by all the Calamities of a Civil War which had lasted twenty Years; the Patrons and Champions of Liberty, tired with their past Troubles and desirous of Peace, were ready to purchase it at any Rate; and therefore they who had drawn the Sword in Defence of their own Laws and in Support of the common Rights and Liberties of Mankind, even after they had obtained the End they contended for, out of Fear that the like Times of Distraction might return again, at last sheathed that Sword under an Oath, that *it was not lawful upon any Pretence whatsoever to take up Arms against the King* †. Corrupted afterwards with Pensions and Places, and dazzled with Royal Favour, they carried the Claims of Prerogative so high, as at last to endeavour to obstruct the antient Operation of Juries ‡, and by these and such

* — Augustus—*cuncta discordiis civilibus fessa* nomine Principis, sub imperium accepit. Tacit. *ibid.*

† 13 Car. II. cap. 3. Militia Act.

‡ The Chief Justice Scroggs, 1680, was impeached for discharging the Grand Jury before they had finished their Presentments, one of which was designed against the Duke of York as a Popish Recusant.

like Means, to introduce the same Submission to the absolute Will of the Prince, as obtained in other Monarchies ever since the *Lex Regia*: how these pernicious Designs happily were prevented every one knows.

Thus it was that the *Lex Regia*, and the subsequent Civil Law grounded on the Powers vested by that Law in the Emperors, established despotic Government in Europe; the several States of which had before lived happily under such Laws as were founded in Liberty, and such Institutions as grew out of natural Equity; whereas, when once the *Lex Regia* took place, every thing both at Rome and its Dependences, was directed solely by the Will of the Prince; hence proceeded the Body of Laws called Constitutions, the Edicts of the Emperors, the Codes of Theodosius and Justinian, those collected by Gregory and Hermogenes, the *νεραι διαταξεις* or Authentica, and the rest of the *Novellæ*; all which were the absolute Acts of the Prince, without the Intervention or Consent of the People.

Thus it was that the absolute Power of Princes, countenanced by the Civil Law which followed the *Lex Regia*, obtained in Europe and destroyed public Liberty; and it is to be observed in the History of our own Country, that those Reigns that have taken the largest Steps towards Despotism and absolute Power, have bore hardest upon and been the greatest Enemies to Juries: and for this plain Reason, because where Juries are maintained in their original Vigor and Operation, Oppression and Tyranny are less capable of disturbing the Public or injuring Individuals*.

* 9 Hen. IV. 11 Hen. VII. &c. The first granted Powers to Justices to arrest Rioters, and their Certificate returned to the King and Council within a Month, was to be of as great Force as Presentment by a Jury. That of Hen. VII. enabled all Judges and Justices to hear and determine all Offences, Contempts, &c. done by any Persons, *at their Discretions*.

The Institution of a Jury being thus the Child of Equity and natural Justice, and a Flower that hath grown no where else but in the Country of Liberty; let us proceed to enquire what Vestiges of it are discoverable under the Democracy of Athens, and the Republick of Rome.

The first Form of established Government in the Infancy of Mankind seems to have been Democratical—When Men put themselves under Laws, they were such as they chose and agreed upon amongst themselves*;—for who had a Right to impose them? Hence Aristotle in the Definition of Law says, *ο Νομος ομολογια τις εστιν* that Law is a Kind of Compact or mutual Agreement. lib. i. Politic. cap. 6. For the easier Execution of them, they delegated a Power to a certain Number of their Fellows to preside and direct the Operation of them, to which Trust, by their Equality, they all succeeded in their Turns: But in Process of Time and by imperceptible Degrees, the Governors from being the Servants of the Public aspired to become the Masters of it, and by the Power and Emoluments they had at Hand to dispose of, they bought the Consent of the Majority with their own Contributions, to be ruled by the absolute Will of one or more in an Aristocracy, rather than the mutual Concurrence of the whole according to the established Course of Government by Law. That this was the Origin of the Athenian Polity (the most civilized of all the ancient Nations, and from whom most other People borrowed their Laws and Institutions) we learn from the *λογος επιταφιος* or funeral Oration, pronounced by Lyfias over his Countrymen that fell in assisting the Corin-

* All Laws were grounded upon Nature, and no Nation was, that out of it took not their Grounds, and Nature being the same in all, the Beginning of all Laws was the same, &c. See Selden's Notes on Fortescue de Laud. Leg. Angliæ—well worth the Reader's Perusal.

thians against the Lacedemonians; he says, *ἡ ἀρχὴ τῆ βίῃ δίκαια*, &c.
 “ The Beginning of this State was laid in Justice and Virtue: we were
 “ not like some others, a vile Collection of Vagabonds and Plunderers,
 “ who dispossessed others to seize their Settlements, but we were an-
 “ cient as this Soil, and Children Time immemorial of this our
 “ Mother Country. We were the first and only People of that Age
 “ that rejected Servitude, expelled Tyrants, and formed our Govern-
 “ ment on Principles of Liberty and Unanimity; we carried on our
 “ Affairs with one Heart and one Mind, having our Hopes and Fears
 “ in common—Our Laws were framed for the Reward of Virtue and
 “ the Punishment of Vice; we did not live like brute Beasts in a State
 “ of War and Violence, but like Men, we pointed out what was right
 “ by Law, recommended it by Exhortation, and practised it in
 “ our Conduct: Thus the *Law was our King*, and right Reason our
 “ only Instructor, *ὕπο νόμῳ βασιλευμενοὶς ὑπο λόγῳ διδασχομενοὶς*”—
 An Expression spirited and elegant *.

Hence Aristotle calls the Plan of Government, instituted by Solon,
δημοκρατίαν πατριαν, their *native Democracy*, by which he meant no
 more than that it was the antient Constitution revived by him; in mo-
 delling of which he made it a *mixed Government*, *μῖξαντα καλῶς τὴν*
πολιτείαν, forming one Whole out of all the Members; and setting
 aside Oligarchy, because it was too unmixed, *λίαν ἀκρατον ἔσαν*, that
 is, it consisted of too many of the richer Sort, and consequently like to
 be less favourable to the Universality of the People; whereas the Plan
 and End of the Institution of Solon had this chiefly in View, *δυσλευ-*
ρῆσαι τὸν δῆμον παύσαι, to ease the People from the Oppression they lay
 under from the Aristocracy, by giving them also their Share, both in

* *Ἡ ἀρχὴ τῆ βίῃ δίκαια* Λογ. ἐπιταφ. Lyfiæ.

making Laws and executing them. It was from this Unanimity and joint Interest, the Consequence of Equality, that the lowest Man in the State was as much the Object of Protection and Defence as the greatest. These Principles gave Rise to that Regulation in the Courts of Justice, that did not leave the Decision of a Cause to *one Man*, or *a few of the greater Sort*, but to a large Number of *all Ranks* chosen by Ballot from among every Class, and sworn in the most solemn Manner to do Justice*. So that the poorest Man had the fairest Prospect of an impartial Judgment from this Kind of Trial *by his Equals*.

This Equality did not consist in any levelling Principle, by confounding the Ranks, Orders and Distinctions of Men necessary in Society, but it was only such a Privilege as enabled them equally to vote for the Laws that they were to be governed by, and to be Members of the *βελη* or Council of 500, which were in the Nature of a *Grand Jury*, to see that no Business was laid before the People but what was proper, and to be ballotted into the *Petty Jury* as *δικασται*, to try such criminal and civil Causes as belonged to the Jurisdiction of the *Δικαστηριον* †. This *Kind of Equality* respecting only the Civil Rights of every Member of the Community, is that Ingredient in the Athenian Constitution, that Aristotle always speaks of so magnificently as the first Principle of Liberty.

This Right of judging all Persons in all Cases, belongs to the People in general, says he, *and in such an Equality consists the very Nature of a*

* Σολων δικαστηρια ποιησας εκ παντων. Aristot. Polit. lib. ii. c. 10.

† Οι δικασται εξαπαντων Αθηναιων. Lucian in Dicaeterio. Vide Polluc. lib. viii.

— εις τας αρχας βαδιζεσιν παντες κατα μέρος εκ των φυλων, &c. Aristot. lib. iv. c. 14.

— το δικαζειν παντας, η εκ παντων, η περι παντων. Id. lib. vi. c. 2.

Democracy *. Again—It is necessary that every Citizen should be equal, for that is the very Characteristic and Criterion of Liberty †. And in another Place, It is this mutual Equality that is the chief Preservative of Civil Polity ‡. We see then that by this Equality being the Criterion of Liberty, no more was meant by Aristotle than an equal and just Participation of the Protection and Benefits of the Law, which he therefore calls the very Mark of Liberty, which all Persons in a free State, or Democracy, such as Athens was, were entitled to. I have been thus far particular in explaining what was understood by Equality, the *ισότης* in the Democracy of Athens, because it may serve to throw some Light on the Principles of our own Constitution—It is by this self-same Equality, that the Commons of England are bound by no Laws but which they consent to, and are so far from fearing Oppression from Despotism or Aristocracy, that they may not be damaged in their Persons or Property but by the lawful Judgment of their Peers—*per legale judicium parium suorum*. That *ισότης* or Equality, which was the very Mark and Characteristic of Liberty among the Athenians, and was the Foundation of that Policy of Solon, when he formed his Dicasterion, Δικαστήριον, or Jury out of all Ranks, we find to be also the Bulwark of English Liberty for the same Reason; for as no Man was to suffer in any Shape but by the Suffrage of those of his own Rank, who were to be Part of his Jury, so among us, by the Charter of Liberties or Magna Charta, no Man

* — το μὲν ἐν παντὶ καὶ περὶ πάντων δημοτικόν, τὴν τοιαύτην ἰσότητα ζητεῖ ὁ δῆμος. Aristotle, lib. iv. c. 14.

† — δεῖν τοῖς ἰσὺν εἶναι ἑκάστου τῶν πολιτῶν, ἔν μὲν ἐν τῇ ἐλευθερίᾳ σημεῖον τυττόν. Ibid. lib. vi. c. 2.

— ἡμῖν δὲ προσήκει τοῖς τὴν ἰσὺν καὶ τὴν ἐννομὴν πολιτείαν εἶχουσιν. Æsch. κατὰ Τιμαρχόν.

‡ — τοῖς ἰσὺν τοῖς ἀντιπεπονητοῖς σώζει τὰς πόλεις. Aristotle, lib. ii. c. 2.

was to be molested in Person or Property but by the *legale judicium patrum suorum*—The Laws of Solon were to the Athenians, what the Magna Charta is to Englishmen, an Institution of Liberty, a Defence of the People against the Power of the Great *, and a Direction for the Governor and governed; and indeed, tho' the Form of the Athenian Polity be called a *Democracy*, it was in fact no other than a *mixed Government* †, composed, like the English, of the chief Magistracy, a Senate or Aristocratic Body, and a Δικασηριον or Jury to determine all Civil or Criminal Causes; the Power of which was so great, that there lay no Appeal from its Decisions ‡, because it was the great Representative of all the People that sat *as a Jury* in judicial Cases.—This Regulation in favour of Liberty, established at Athens by Solon, was so well received and applauded by the neighbouring States, that we find the Romans after they were freed from the Tyranny of their kingly Government, sending over an Embassy to Greece, praying a Transcript of their Laws, and Model of their Government, which as soon as they returned with, became the Plan upon which the Civil Polity of the Roman State was erected. From this Period we find it chiefly democratical, consisting of the Balance of Power well poised, for some Time at least, between all Ranks of the People, till the Great began to make Encroachments on the lower Sort, in many Instances, but particularly in that of the *Judicia* or

* δαλευοντα τον δημον παυσαι. Aristot. lib. ii. c. 12.

† — καλως μιξαντα (Solonem) την πολιτειαν.

‡ — κυριον ποιησαντα (Solonem) το δικασηριον παντων, κληρωλον ου δικασηριον ποιησας εκ παντων. Aristot. lib. ii. c. 12.

τα κρινομενα τας κρισεις απασας εστι τα δικασηρια. Demosth. κατα Τιμοκρατους, p. 270. Edit. Taylor.

οι αιε δικαζοντες ισχυροι η κυριοι των εν τη πολει παντων. Demosth. c. Midiam.

Jury,

Jury, which the Senate had assumed to themselves, and had excluded all the other Orders of Citizens; by which the lower People were totally in the Power of the Senate, and in all Causes relating to Person or Property absolutely at the Mercy of their Decisions.—This State of Inequality, Oppression and Deviation from their original Principles could not last long: Accordingly we find the future Ages of Rome always contesting this Point, out of what Orders the *Judices* should be chosen, down to the End of all Liberty under the Emperors; and in Proportion as this *Equality* was invaded, and these Bonds that tied together and connected all the Parts of the State became loosened and ineffectual, so the Vigour and Constitution of the whole Body Politic grew weak, decayed, and at last sunk into the lowest Servitude.

Dionys. Halicarn. Antiq. Rom. lib. iv. sect. 43. Edit. Hudson, tells us, That the Laws of Tullius in favour of Liberty and Equal Law, ἐξ ἰσῶν τὰ δίκαια, were totally taken away by Tarquinius Superbus: Whence we see, that the Principle of *Natural Right* and *Equal Law* had originally Place in the Roman Government as well as the Athenian, till absolute Power and Tyranny under Tarquin destroyed the very Appearance of Liberty by the most violent Exertions of Will and Pleasure, which he shewed, not only by trampling upon all the Laws established by the Kings his Predecessors, but by the most horrid Butcheries of all those that stood in the Way and interrupted his Designs. εἰς ὁμολογῶμενην τυραννίδα μετέστρεψε τὴν ἀρχὴν. Ibid.

Civil Liberty being thus, both in Greece and Rome, founded in *Equality*, that is, a joint Power and Participation of enacting and executing Laws, we hence see the Reason why the *Trial by our Equals*, the *legale judicium parium suorum*, makes so great a Figure in the Character of English Liberties; for while we are bound by no Laws but those we consent to, and suffer no Judgment under those Laws but

by the Approbation of honest Men of our own Rank and Condition, who have no Interest in Injustice, but an Expectation of the same Candor and Integrity in us upon some other Occasion, where perhaps we may be a Jury on them or their Affairs, there is no Danger of being ruined and undone by arbitrary Laws, or oppressed by the partial Determination of a corrupt Judge. This was the Liberty and Happiness that arose from that *Equality* which was the Foundation of the Greek and Roman Constitution, and is the very Spirit and Life of our own. From these Considerations the learned Author of the Observations on the Statutes may perhaps be induced to alter his Opinion, *that the Trial per Pares in the 29th Chapter of Magna Charta was meant chiefly to relate to the Trial of the Barons by their Peers*, p. 26. whereas the *Pares* here signified no more than their Fellow-Subjects, living under the *equal* Enjoyment and Protection of the Laws of the Land. That *Pares* here could not mean the Peers of the Realm or Barons is plain from hence, that it is connected in Construction with *nullus liber Homo*, which determines the Signification of *Pares* to Men of the same Rank with the *liber Homo*, which was a general Expression designed to take in every Man that had a Right to the *equal* Dispensation and Protection of Law in a free State, and therefore was to be tried by his Equals, or a Jury of free Men, i. e. not by the Emiffaries as Instruments of the Crown or Baronage, but by equal Law, which, in the Words of Aristotle, was the *εν της ελευθεριας σημειον*, the very Criterion and Mark of Liberty as well in England as at Athens. And this Provision is expressly mentioned in the Athenian and Roman Law —*εκρινετο δε το πραγμα εν τω δικαστηριω*—The Cause was tried by a Jury before the People, *Æschin. c. Timarch. p. 40.* where it is to be observed, that *δικαστηριον* signifies the Court of the *δικασαι* or Jury.—And this Method of Trial was the very Foundation of Liberty both
in

in the one State and the other; for the Δικαστηριον was no other than a Trial by a Jury of the People, who were called δικασται; and the Judicia among the Romans was the same Kind of Trial by the Judices or Jury, who were chose annually out of all the Ranks of Citizens; and the chief Occurrences and Revolutions in the Roman State from the Time of the Gracchi to the Emperors, were owing chiefly to the Struggle of the People for the Liberty of a general Jury chose out of all Classes; whereas the Senate and great Men would have confined the Jury to be chose out of themselves, and thereby become the Masters of the Lives and Fortunes of the lower People, which will be seen more at large when we come to consider the Judicia or Jury among the Romans. Upon the whole we may observe, that the ισοτης or Equality of the Greeks, the εξ ισετα δικαιο of the Romans, and the legale judicium parium among the English, were the same in Principle and Effect, namely, an equal Participation of Justice under the Distribution of Men of their own Rank.

We shall now proceed to take a View of the Method of Trial by the δικαστηριον or Jury of Athens, which arising from the same Principle of Liberty as an English Jury, was conducted with the same Forms, allowing only for the Difference of their political Constitution from ours.

The presiding Magistrates in Athens were nine; the Archon, from whom the Year was denominated τε ενιαυτε επωνυμος; the βασιλευς or Rex Sacrorum, who sat as Judge in Causes relating to Religion and Things sacred; the Polemarchus or President in military Matters, and six Thesmothetæ θεσμοθεται, who heard Criminal Pleas of various Kinds*. These chief Magistrates were chose annually, as appears

* Jul. Poll. ανωμασιχ. lib. viii. cap. Αρχοντων Αθηνησιν ονοματα. &c.

from the Year being called after the Name of the chief Archon. Each of these presided as Occasion required, and whose Business chiefly was to settle the Cause for Trial, to give the Ballot, and to receive the Verdict or ψυφος, and declare it*.

When an Action was brought, the Cause and Circumstances of the Complaint were examined by the Sitting Magistrate, who was generally one or more of the Thesmothetæ; the Plaintiff or διωκων, i. e. the Prosecutor, was called upon to shew if he had his Witnesses ready, or wanted to summon any more; the Defendant, if he had any Objection to the Manner in which the Action was laid, and to make his Exceptions. This previous Examination was called ανακρισις †. We see this Word in its proper forensic Signification made use of in the Acts, 25, 26. Festus tells Agrippa that he brought Paul before him, that *after Examination had* he might have somewhat to write,—ὡς ανακρισεως γενομενης χω τι γραψαι; where ανακρισις signifies in the true Attic Acceptation of the Word, the Examination taken before a Magistrate previous to the Trial. The Cause being thus settled and prepared for hearing, the Magistrate *admitted* it into Court, and then it was called δικη εισαγωγικος, or the admissible Plea. Something like this, I understand, is practised in the Courts of Justice in Scotland, where all Exceptions are argued before Trial, that the main Process may not be interrupted; and by a Statute of James I. of Scotland, the Advocate is to swear,

Illud juretur quod lis sibi justa videtur.

The Cause being thus entered for Hearing, the Δικασαι or Jury

* τιθεντες τον αγωνα, η την ψηφον διδουτες. Lyfias. c. Alcibiad.

† — εκαλειτο δε τις θεσμοθετων ανακρισις. Jul. Pollux, ubi supra. et Suidas. προτερον επι τω γινεσθαι κρισις, η τις δικης λεγεσθαι ανακρισις. Vide etiam Harpocrat. in voc.

— επειδη δε μοι αυτην αντεβραψατο μη εισαγωγικον ειναι. &c. Lyfias κατα Παγκλειωνος, 398. Edit. Taylor.

who were to try it, were all chose by Ballot. In the *Ηλιαία*, which was the principal Court, 500 were thus chosen, *out of all the Citizens of Athens of whatever Rank or Condition**, provided they were qualified by being thirty Years of Age, of fair Character, and not in Debt to the Public, that is, competent in Point of *Understanding, Character, and Disinterestedness*.

The Common Jury or *Δικασταί* consisted of 500, but in special Cases, it was encreased sometimes to 1000, sometimes 1500, with one added to determine the Cause in case of an Equality of Voices. *The Hæliæa*, says Pollux†, *consisted of 500, but if they wanted a 1000, they added two Juries together, if 1500, they added three*. And Ulpian upon that Passage of Demosthenes against Timocrates (*δυσὶν δικαστηρίοις εἰς ἓνα καὶ χίλιος ἐψηφισμένοι*) observes, *That in great and weighty Causes they joined two Juries together, making the Number 1001, which odd one was added to determine the Cause, for an Equality of Votes would have acquitted; so that whoever had the odd one, carried his Point‡*. By which it appears, that if the Criminal or Defendant had an *equal Number* of Votes, he was acquitted; so that an odd Voice seemed necessary to determine the Matter before the Court. Accordingly we see in Æschines c. Ctesiphon, where he is speaking

* — Solon. τὰ δικαστήρια ποιήσας ἐκ πάντων. Aristot. lib. ii. c. 10. Lucian et Pollux ubi supra.

† — ἡ δὲ Ἡλιαία δὲ πεντακοσίων, εἰ δὲ χιλίων δεοί, δικαστῶν, συνιστὰς δύο δικαστήρια, εἰ πεντακοσίων καὶ χιλίων τρία.

Vide etiam Harpocration in voce *Ηλιαία*, et Pollux supra.

‡ — ἐν τοῖς μεγάλοις καὶ ἐσπιδασμένοις πράγμασι συνεχούτο ἐκ δύο δικαστηρίων πληρεῖς ἀριθμοὶ χιλίων καὶ ἑνός—διὰ τὸτο ὁ εἰς προσετίθετο αἰ τοῖς δικασταῖς, ἵνα μὴ ἴσων γινομένων τῶν ψήφων ἐξ ἰσῆς ἀπελθῶσιν οἱ δικάζομενοι, ἀλλὰ ἐκεῖνος δοξῇ νικᾶν, ὃν ὁ εἰς προσετίθε. Ulpian in Demosth. κατὰ Τιμοκράτους, p. 443. Edit. Lutetiae.

drotion says, that not having the fifth Part of the Voices, he was fined a thousand Drachms.—He mentions this same Circumstance in his Oration against Androtion, who had accused him of murdering his Father. In some Cases the Fine for want of the fifth Part of the Voices of the Jury was only five hundred Drachms. See Demosth. *περι στεφάνου*, p. 509. Edit. Taylor.

We have hitherto seen the several Numbers of which the *δικασταί* were occasionally composed, such as 500, 1000, or 1500, according to the Importance of the Cause; besides which, there is Mention in Lyfias against Agoratus of a *δικαστηριον* or Jury consisting of 2000: speaking of the violent and arbitrary Proceedings of the thirty Tyrants, against those Patriots who opposed the Demolition of the Walls of the Piræum, he complains that after they had been taken into Custody, the thirty Tyrants proceeded to try them in the *βελη* or Senate, when, says he, the Jury of the People, to the Number of 2000, were ready sitting.—He then proceeds to account for this arbitrary Method of Trial, contrary to the common Forms and common Liberty.—If, says he, they (the Patriots) had been tried by the *Dicasterion*, *the Jury of the People*, they would have been honourably acquitted; but as Matters then stood, when every Measure was carried by Violence and Faction, and as you well know a popular Jury could have been of no Use to them, they were therefore carried before the Senate and the thirty Tyrants, and every Man condemned, except this Informer Agoratus, *who had his Pardon as a Reward* *. We

* *ἐπεὶ δὲ τῶν τριακῶν κατεστάθησαν, εὐθὺς κρίνουν τοῖς ἀνδράσι τούτοις ἐπὶ τῇ βελῇ, ὁ δὲ δῆμος ἐν τῷ δικαστηρίῳ ἐν διχίλοις ἐψηφίζατο, εἰ μὲν ἂν ἐν τῷ δικαστηρίῳ ἐκρινετο, ῥαδίως ἂν ἐσωζάντο; ἀπάντες γὰρ ἤδη ἐγνωκότες ἦτε, ἢ ἢν κακῶς, ἐν ᾧ οὐδὲν ὠφελεῖν ἐδυνάθευεν ὁ εἰς τὴν βελὴν αὐτῆς τὴν ἐπὶ τῶν τριακῶν εἰσαγωγὴν . . . ἐνὶ δὲ λόγῳ, ὅσοι εἰς τὸ βουλευτηρίῳ ἐπὶ τῶν τριακῶν εἰσηλθόντες κριθήσονται, ἀπάντων θανάτος κατεργαστήτεται καὶ ἄλλος ἀπεψηφισάντος πλην Ἀγοράτου τούτου, τούτου δὲ ἀφείσαν ὡς εὐεργετήν ὄντα.* Lyfias. c. Agorat. p. 244. Edit. Taylor.

may observe from this Passage, besides the Circumstance of the *δικασηριον* or Jury, consisting of *two Thousand*, that it was also the Court where equal Law was open to all from the Constitution of it, that it was favourable to Liberty; because it was formed out of all Ranks, and not influenced by the Intrigues of the Great.—For this Reason it is said here, if the Patriots had been tried before it, as they ought to have been, they would have been acquitted by their Peers; as the only Crime they were supposed to be guilty of was an Opposition to Tyranny and lawless Power, which the Dicasterion or Trial by Jury was originally appointed and constituted to restrain.—This the Tyrants well knew, and therefore would not bring them before the People to be tried according to the Law and Constitution of the State, but proceeded against them in a summary Way before the *Βελη* or Senate, where they themselves presided and gave the Law. It is to be remembered, that the Judicatories or Supreme Courts at Athens were of three Sorts, as Aristotle tells us—*The Areopagus was formed upon Principles of Oligarchy, the Βελη or Senate on Aristocracy, and the Δικασηρια or Courts of Jury on Democracy**. So that we hence see the Reason why the Patriots were not tried by a Jury of the People, but by the Aristocracy of the Senate, because by the Principles of their Constitution, the aristocratic Senate was not likely to be so favourable to the common Cause of Liberty as the democratic Jury, and therefore under the Direction of the Tyrants more ready to condemn them †.

* — ειναι εν Αρειω πάγω βελην, ολιγαρχικον, το δε τας αρχας αιρετας, αριστοκρατικον, τα δικασηρια, δημοτικα. Aristot. Pol. lib. ii. c. 12.

† — η δε Βελη προ των τριακωβα βουλευσα διαφερεται και ολιγαρχιας επιθυμειτο. Lyf. c. Agerat. 239.

ινα ειδητε οτι τα ψηφισματα της εκεινης της βελης εκει ευνοια τη υμετερα, αλλ' επι καταλυσει τη δημη τη υμετερη απαντα ελεγετο. Ibid.

At the same Time and upon the same Occasion they attacked one Cleophon, under Pretence that he had quitted the Camp without Leave, which was Desertion; but in Reality he had voted against demolishing the long Walls, and was no Friend to this new System of Despotism; they therefore *packed a Jury for him, and got some of their own Creatures to be put on the Panel*, by which Means he was condemned and executed *.—Let us weigh this Expression *ἐκεῖνῳ δικασηριον παρασκευασαντες*, *packing a Jury* or *Dicasterion* for him: Now this Idea cannot by any Means be applicable to any Kind of Judges or Magistracy who were chose *annually*, and could not occasionally be changed by any Management or on any Pretence whatsoever; but if it be referred to a *Jury*, in the Sense that we use the Word, it will be perfectly agreeable to our Notions about what is called *packing a jury*, the new Choice of them upon particular Trials, and the Methods of corrupting them, which in this Case was by getting some of their Creatures and Friends to be impanelled on this Cause. The Words *εἰσελθόντες οἱ βυλαμένοι ολιγαρχίαν καταστῆσθαι* plainly mean the Favourers of the Oligarchy being introduced among the Jury for the Purpose of destroying Cleophon the Patriot. The *Παρασκευη* or Management here mentioned, is explained by Lyfias in *απολογία*, p. 430. *by Persons entering in among the Jury, and taking Money to acquit the Guilty and punish the Innocent* †. The Words *εἰσελθόντες* and *εἰσιόντες*, *entering in among the Jury*, relate to a Custom of enclosing the *Δικασηριον* with a Rope, that none but the *δικασται* should enter; which corresponds with a like Practice used by us with regard to a Jury, who are enclosed for the same Purpose and guarded by an Officer that they may not lie open to improper Influence, of which we shall see more in its proper Place.

* — ἐκεῖνῳ μὲν ἐν δικασηρίῳ παρασκευασάντες, καὶ εἰσελθόντες οἱ βυλαμένοι ολιγαρχίαν καταστῆσθαι ἀπεκτινάν ἐν τῇ φροναίῃ ταύτῃ. Ibid. 236.

† τοῖστοι γὰρ ἦσαν, ὥστε τὰς μὲν ἡμαρτηκότας ἀργυρίου λαμβανούσας ἀφίεναι, τὰς δὲ μηδὲν πεικνυόσας εἰς ὑμᾶς εἰσιούσας ἀπολλύσαι. Lyf. δημ. καταλυσ. ἀπολογία.

This Management and packing a Jury is called by Æschines also c. Ctesiph. ad init. παρασκευη; and those that were corruptly chose εκ παρασκευης καθεζομενοι, sitting as a Jury by Bargain. This Cicero, Verr. 1. calls *per pactiōnem* or *per conditionem et pactum* *. Whence we use the Expression, a Pact Jury, or *Jury by Pact*; which wicked and flagitious Practice is called in our Law, *the evil procuring of Dozens*, or *a Jury of Twelve Men*, against which a Remedy is provided, 28 Ed. I. Stat. 3. c. 10.

The Manner of procuring this Dicafterion or Jury to destroy Cleophon, we are told by Lysias, c. Nicomach. was thus: Cleophon reproached the βελη or Senate, that they were in Conspiracy against the Public, and did not sufficiently consult the Honour and Good of their Country. Satorus, one of the Senate, proposed he should be seized and delivered bound to be tried by the Dicafterion or Jury; but those that were particularly desirous to destroy him, fearing that he would not be condemned by the Dicafterion or Jury, persuaded Nicomachus to propose a Law, by which the βελη or Senate was to be joined to, and vote among the Jury; which accordingly was done, and the Trial brought on the same Day †. This Prosecution against Cleophon was chiefly carried on against him because he was a Patron of the People, and the Conspirators against the Constitution of their Country had him for this Reason chiefly in View to be taken off; for as he was a declared Friend of the People, if they could put him to Death, they

* Sciebam in rejiciendis Judiciis nonnullos memoria nostra *pactiōnis suspiciōnem* non vitasse. Cicero Verr. 1.

Redemptio est hujus Judicii facta grandi pecunia, mansit in *Conditione* atque Pacto usque ad eum finem dum judices rejeeti sint. Ibid. Verr. 1.

† Lysias, c. Nicomach. 475.—Οι δε βελομενοι αυτου απολυσαι, δεδιotes μη εκ αποκτεινωσιν εν τω δικαστηριω πειθεσι Νικομαχον νομου αποδειξαι, ως χρη η την βελην συνδικαζειν, &c.

would be more at Liberty to oppress their Country *. Upon which we may make a Remark, That as Juries have at all Times been founded in Liberty, and been, as it were, Guardians of the People from Oppression, so all arbitrary Governments have been Enemies to them. Instances of this among many others we may find in 9 Hen. IV. where the Certificate of Justices relating to the Arrest of Rioters returned to the King and Council, should be of as great Force as Presentment by a Jury: So likewise 11 Hen. VII. Panels returned by the Sheriff to enquire for the King might be reformed by the Justices, i. e. the Judges might make whom they pleased Jurymen; and under Empson and Dudley we know of what pliable Metal Judges were made of; under Charles II. likewise we have before seen the Impeachment of Chief Justice Scroggs, 1680, on Account of obstructing the Presentment of a Jury. To these may be added, the Act of the 31 Hen. VIII. cap. 8. giving Power to the King to issue Proclamations with such Pains and Penalties as he shall think proper, not extending to Life or Forfeiture of Lands; and whoever leaves the Kingdom to avoid a Prosecution thereon to be adjudged a Traitor. So under the thirty Tyrants, when the Patriots and Friends to Liberty and their Country withstood the arbitrary Proceedings that were levelled at the Destruction of the Democracy of the Athenians, they were laid hold of and prosecuted under various Pretences; and when they ought to have been tried by their Country and the *δημος εν δικαστηριω*, the popular Jury, the Senate was joined to it, and Persons bribed and packed to condemn the Assertors of Liberty, which would never have happened, if they had suffered them to be tried according to the ordinary and usual Forms of Law under the Republick, i. e. the Dicasterion or Jury.

Let us now take a View of the Dicasterion as thus described in the Affair of the Patriots and Cleophon. It was a Judicatory composed

* *εκεινον εβουλοτο μαλιστα των πολιτων εκποδων γινεσθαι — ινα εκεινος αποκτεινεν αυτοι υμας πακως ποιησι.* Lys. c. Nicomach. 476.

of all Ranks, the Patron of Liberty, chose by Ballot upon every Cause, but in this Case packed and corrupted by arbitrary Power, receiving Money to acquit the Guilty and punish the Innocent; and as to its Number, consisting of 2000, more or less according to the Importance of the Cause; I would therefore ask those who render *δικασαι* by Judges, and suppose these Members of the *Δικασηριον* to act under the same Kind of Jurisdiction as the Judges in our Country. Whether this Institution does not bear a much nearer Resemblance to the Spirit and Operation of our *Jury* than to any other Kind of judicial Proceeding; whatever?

The *δικασηριον*, which the Senate would not suffer the Patriots to be tried by, we have seen consisted of 2000, *εν δισχιλιος εψηφισατο*, so that as Occasion required it consisted sometimes of 500, 1000, 1500, or 2000; which was the Meaning of the Words *αν τ' οποσες αν, η πολις καθιση*, or *as many as the Public shall appoint*, for we have seen above that the Numbers of the *δικασαι* varied according to the Importance or Nature of the Cause. Besides these Numbers, I find Mention in Demosth. c. Meid. of the Number 200---If; says he, *you would please to consider, you that are on the Jury δικαζοντες, how powerful you are, being Masters of the Lives and Fortunes of the Citizens, whether you are 200 or 1000, or as many as the City thinks proper to appoint**. Upon which we may remark, that as the *δικασαι* were varied as to their Number according to the Importance of the Cause, and sometimes were 500, 1000, 1500 and 2000; yet I never remember the Number of 200, except in this Passage of Demosthenes; and therefore instead of *διακοσις*, I think we may read the Word *πεντακοσις* as most agreeable to the Numbers in Demosthenes, Lyfias, Polux and Ulpian, when applied to the *δικασαι*.

* *οι αι δικαζοντες ιχυροι ες κυριοι των εν πολει παλιν αι τε διακοσις αν τε χιλις καθ' οποσες αν η Πολις καθιζη.* Demosth. c. Meid. p. 165. Edit. Taylor.

A second Remark that I shall make upon this whole Passage of Demosthenes at the Conclusion of his Accusation of Meidias is, that it contains a particular Account of the Power and Authority of the Δικασται. He says they were chose by Ballot on every Cause δικάσοντας εισηχάτε, which could not relate to any Judges or Magistracy, and that by their Decisions they were absolute Disposers of every Thing in the State, ισχυροὶ καὶ κυριοὶ τῶν ἐν τῇ πόλει πάντων; that this extraordinary Power and Privilege was not the Effect of Force or any personal Qualification, but was founded in the Dignity and Authority of Law itself---And in what did that consist? *Was it in any actual Interposition of the Law by itself, when any injured Person called for its immediate Help and Protection?* No; the Law is a dead Letter, and so far could afford no Help---But it is you, the Δικασται, that make the Laws operate, and by these Means you are a mutual Support to each other; for the Laws are made effectual by the Verdict of the Jury, and you the Δικασται or Jury become respectable by the Countenance of the Law---*οὐκ ἔστι οἱ νόμοι· τε ὑμῖν εἰσὶν ισχυροὶ, καὶ ὑμεῖς τοῖς νόμοις*---So that no Circumstances of Office or Compassion, or Power or Artifice, or any other Consideration can skreen a Transgressor of the Law from due Punishment*.

We may observe as we pass, that the Νομοθεταί, Nomothetae: (whatever their Function was) were chose out of the Δικασται, or sworn Jury---I should think, that their Business was to examine the State of the Laws, that none should be in Defuetude or contradictory to each other. We read in the Psephismata or Decree made by Timocrates, that the Number of them was 1001, who were to be chose

* Vide Demosth. c. Meid. ad fin. ὅτι τῷ μεθ' ὧν εἶναι συντέταγμένοι μενοὶ τῶν ἄλλων πολιτῶν, εὐροῖτ' ἂν ὅτι τῷ τὰ σώματα ἔχειν ἀριστα, καὶ μάλιστα ἰσχύειν τὰς δικάζοντας---ὅτι τῶν τοιούτων ὄντι, ἀλλὰ τῷ τὸν νόμον ἰσχύειν· ἡ δὲ τῶν νομῶν ἰσχύς, τίς ἐστίν; &c.

out of the sworn Jury *. That it was Part of the Business of the *δικασαι* to regulate the Laws νομοθετεω, as well as to determine upon them κρινω, appears from a Passage of Æschines, c. Timarch. p. 53. You see, says he, how many Persons are here assembled, and some of other States of Greece, not so much to hear me as to see you, and observe not only whether you are skilled in the Inspection and Appointment of what shall be Law νομοθετειν, but how far you are able to judge and give a Verdict what is right or wrong κρινειν †. So that hence we learn, that the Office of the *Δικασαι* was Νομοθετειν as well as κρινειν, to appoint what Laws should be in Force, as well as to determine according to them; and p. 75. He desires them as a Jury *δικασαι*, to be of the same Opinion as when they were Νομοθεται, lest you should, says he, seem to be severe against Crimes not yet in Being, and negligent and regardless when they have been committed; so that in short, if you put not the Laws in Execution, you may be said to have good Laws, but useless and of no Authority ‡.

We have thus far seen the Numbers of the *Δικασαι* or Jury as Occasion required; that they were the Supreme Tribunal §, and that they were the only public Men that were chose by Lot ||, which dis-

* — τες δε Νομοθετας ειναι ενα και χιλεις εκ των ομωμοκωτων. Demosth. c. Timocrat. p. 375. Edit. Taylor.

† ει μη μονον ευ νομοθετειν επισασθε αλλα και κρινειν τα καλα και τα μη καλα δυνασθε. Æschin. c. Timarch. p. 53.

‡ — αλλα και την αυτην γνωμην εξετε νομοθετους και δικαστους—εαν μιν κολαζητε τες αδικησας, εσοιαι υμιν οι νομοι και καλοι και κυριοι—εαν δε αφητε, καλοι μη, κυριοι δ' εκ επι. Æschin. c. Timarch. p. 75.

§ — αυτη γαρ εστι παντων εν τη πολει κυριωτατη. Lyfias. Eratosth. cæde, p. 21.

|| κυριον ποιησαντα (Solonem) το δικαστηριον κληρωτον ου. Aristot. lib. ii. c. 12.

Pollux, lib. viii. ubi supra, says θεσμοθετων πληρωτων το δικαστηριον that the Thesmo-thetæ drew the *Δικαστηριον* by Lot; and explains πληρωθε το δικαστηριον by εκληρωθη, p. 460.

tinguishes them from all Kinds of Magistracy (who were *αιρετοι*, chose by *χειροτονια*, holding up the Hand, or the Ballot of the Bean or *κναμνος*) and that they were chose out of all the People.

We will proceed to observe next, that after they were thus chose by *Lot* they were sworn. The Oath they took is called by Demosth. c. Timocrat. *ορκος Ηλιαστων*, the Oath of the Heliastæ, or the Jury before the Court *Ηλιαια*, which was the Principal; but by Æschines, c. Ctesiphon, it is called *δικαστων ορκος*, or the Oath of the Dicastæ, and was as follows:—" I will give my Verdict (*ψηφισμαί*) according to the Laws, the Decrees of the People of Athens, and of the Senate of 500. I will not approve of Tyranny, nor Oligarchy, nor the Dissolution of the Democracy, nor consent to any Steps taken towards it. I will not agree to cancel any Debts or make a Division of any Lands or Houses. I will not recall any that are banished or condemned, or drive away any of our Inhabitants contrary to Law, and the Decrees of the People and Senate, either by myself or any other. I will not let any one succeed to a second Magistracy till he has given an Account of his first; whether he be of the chief Magistracy, as the Archons and Hieromnemon, &c. or of the latter, such as the Herald or Ambassador, &c. Neither shall the same Man bear the same Office twice, nor hold two in one and the same Year. I will take no Gift or Bribe for my Voice, either by myself or any other for me with my Knowledge, directly or indirectly, upon any Consideration or Pretence whatsoever. I am not less than Thirty Years of Age, and will hear the Plaintiff and Defendant both equally and with Impartiality; and I will give up-right Judgment in the Cause in Question: And this I swear by Jupiter, Neptune and Ceres. If I falsify this Oath, may the Gods curse me and my Family, but bless me and mine as I religiously

" ob-

“ observe it *.” By the Mention of Jupiter, Neptune and Ceres, no more was meant than that he renounced the common Benefits of Air, Water and the Earth, that is, in short, all the Blessings of Life, if he observed not his Oath; and likewise wished a Curse on his Posterity if he broke it, but hoped for a Blessing if he acted uprightly---A Manner of Execration which seems to be imitated from the Hebrews, among whom God visited the Iniquity of the Fathers on the Children unto the third and fourth Generation of them that hated him, and shewed Mercy unto Thousands on them that loved him and kept his Commandments. *Exod. xx.*

We may observe from the Part of this Oath relating to the Magistracy, that the *δικασται* who took it, and before whom all the Magistrates were liable to undergo the *Δοκιμασια* or Trial of Approbation, and according to whose Verdict they were admitted or rejected, were themselves no Part of the Magistracy, neither Archons, nor the upper Magistrates, nor Heralds or of the lower Sort. *εδε αρχην κα-*

* *Ορκος Ηλιασων*. Ψηφισμαι κατα της νομης και τα ψηφισματα τε δημω των Αθηναίων και της βελης των Πεντακοσίων και τυραννον ε ψηφισμαι ειναι, εδε ολιγαρχιαν, εδε εαν τις καταλυη τον δημον Αθηναίων, η λεγη η επιψηφιζη παρα ταυτα, ε πεισομαι, εδε των χρεων των ιδιων αποκοπας εδε της αναδασμων της Αθηναίων εδε οικιων, εδε της Φευγούλας καταξω, εδε ων θανατος κατεγνωσται, εδε της μενοντας εξελω παρα της νομης της κειμενης, και τα ψηφισματα τε δημω των Αθηναίων και της βελης, ουτ' αυτος εγω, ουτε αλλον εδενα εασω, εδε αρχην καταστησω ωσε αρχειν υπευθυνον οντα ετερας αρχης και των εννεα αρχοντων και τε ιερομνημονος και οσοι μετα των εννεα αρχούων κυαμεινούται ταυτη τη ημερα και κηρυκας, και πρεσβειας και συνεδρων, εδε δις την αρχην τον αυτον ανδρα, εδε δυο αρχας αξει τον αυτον εν τω αυτω ενιαυτω, εδε δωρα δεξομαι της Ηλιασεως ενεκα, ουτ' αυτος εγω, ετ' αλλος εμοι, ετ' αλλοι ειδωτος εμω ετε τεχνη ετε μηχανη εδεμια. Και γιγωνα εκ ελαττον η τριακοντα ετη, και ακροασομαι, τετε κατηγορη και τε απολογημενε ομοιως αμφοιν και διαψηφισμαι περι αυτε ε αν η η διωξις.—Επομνυμι Δία, Ποσειδωνα, Δημητρα, και επαρωμαι εξωλειαν εμαυτω και οικητη εμαυτε ει τι τωτων παραβαινωμι, ευορκησι δε καλα πολλα καγαθα ειναι. *Demosth. c. Timocrat. p. 418. Edit. Taylor.*

τάσσω ἐν τῶν Ἀρχόντων, &c. *I will not confirm the Magistracy of the Archons, &c. and the other Magistrates without Account*; for we read in Demosth. c. Leptini, that it was the Law of Solon that the six Thesmothetæ should be twice proved, once before the βελη or Senate, and once before the Δικασηριον or popular Jury.—θεσμοθετας—δὲς δοκιμασθῆναι ἐν τῇ βελῇ καὶ παρ' ὑμῖν ἐν δικασηρίῳ, p. 37. Taylor; and if the δοκιμασία reached the six Thesmothetæ, undoubtedly it extended to the other three Archons; and if to them, then a fortiori to all the lesser Degrees of Magistracy. Hence it is they swore ἐς ἀρχὴν κατήσσω, &c. *I will not admit any one into the Magistracy without this Δοκιμασία or Proof of his Merit*; from all which it evidently appears, that they who were to admit and confirm all Sorts of Magistrates*, were not Magistrates themselves or presiding Judges (which were for the most Part taken from among the nine Archons) but a Committee of the popular Estate, that were appointed by the Constitution to watch over the Concerns of the Public, and to try all ordinary criminal Cases like our Jury†.

The Form and Solemnity in taking the Oath was by holding the τὰ ἱερά or sacred Things in his Hand, which Lycurgus against Leocrates, and Æschines c. Timarchus, and the Rest of the Orators make frequent Mention of‡. What the τὰ ἱερά or sacred Things were,

* — ὑφ' ὑμῶν δοκιμασθεῖς. Lysias de Alcibiadis Λειποταξ.

† See Taylor's Note on the last Argument of Æschin. c. Timarch. voc. δοκιμασίαν.—οὗτοι κληρονομοῦντες λαγχάνειν μὲν, ἀρχὴν δὲ οὐκ, εἰ μὴ δοκιμασθέντας: popularem adversus vos sere actionem ut judicarentur, an idonei essent ad conscientiam habendam.

‡ λαβόντες τὰ ἱερά κατὰ τὸν νόμον ἐξομολογῆσαι. Lycurgus c. Leocrat. Sect. 7.

— λαβὼν εἰς τὴν χεῖρα πάντα τὰ ἱερά καὶ ὁμοσας. Æschin. c. Timarch. p. 52. Edit. Taylor.

— δωμοσάτο κατὰ τῶν σφαγίων. Super victimas juravit. Dion. Halic. iv. c. 58.

we find to be the *Altar or the Victims on the Altar*, which the Person that swore either touched or laid hold of, and is what is meant by λαβων εις την χειρα τα ιερα in Æschines.

This, like most other religious Customs, took its Rise in the East, and among the Jews we find the Practice of *swearing by the Altar, or the Gift that was upon the Altar*, Matt. xxiii. 18. So likewise among the Latins, the Ceremony of *swearing an Oath* was by laying the Hand upon or touching the Altar. So Cic. pro Flacco—*Ergo is qui, si aram tenens juraret, crederet nemo, per Epistolam injuratus probabit.* Hence they used the Word *Sacramentum* for an Oath.

But the most ancient Form of Swearing we meet with in Genesis xxiv. 2. He that swore put his Hand under the Thigh of the Person to whom he gave his Oath; *Put, I pray, thy Hand under my Thigh, and I will make thee swear * by the Lord God of Heaven and Earth*, says Abraham to the eldest Servant of his House. So likewise, Gen. xlvii. 29. the Oath of Joseph to Jacob, that he would not bury him in Egypt, was taken in the same Manner.—*Put thy Hand under my Thigh and swear to me; and he swear to him.* The Reason for this Ceremony was supposed to be, that the Muscles of the Thigh corresponding with the Loins, were instrumental in Generation, and therefore sacred. Hence, Gen. xlv. 26. *the Souls that came out of Jacob's Loins*, in the original Hebrew is, that came out of *Jacob's Thigh*; and Exod. i. 5. what is rendered in the Translation, *Loins*, in the Original is *Thigh*, which in the Hebrew is ירך Jareck; whence the Greeks formed their ορχος or the Oath by the *Jareck*, and the ορχις testiculus. M. Trippault in Dictionnaire Etymologique de Menage,

* שים-נא ירך תחת ירכי ואשבע Gen. xxiv. 2.

derives hence the Word *Jarret* for the *Ham*, and *Jarretiere*, the Binding round the *Ham*, or *Garter*, under the Word *Jarret*.

The Forms of administering an Oath varied in all Countries according to the Notions they had of Things sacred: They agreed however in this, that an Oath in what Manner soever it was taken, was a solemn Appeal to the Deity.—In this our Country, the Oath at different Periods, was on the Reliques of Saints, the Cross of Canterbury, the Gospels; and in the Welsh Laws of Hoel Dda*, there is an Oath, which I mention for its Singularity, which was taken on a *Bell without a Clapper*, and called *Llw ar gloch heb tafad*. The Bell being consecrated to some Saint, was accounted sacred for the Purpose of swearing on; but why without a Tongue or Clapper, I leave to the Conjectures of the Learned,

But to return to our Subject.—The Δικασαι or Jury were chose and sworn upon every fresh Cause in the Ηλιαια. This appears by the Word ομωμοκοτες, *just now sworn*, applied to the δικασαι by all the Greek Orators. Thus Demosth. c. Meid. *Neither will any of you give his Vote or ψηφος, but according to Right and the Oath you have just now taken*; for the Word ομωμοκος used upon these Occasions of Address to the Jury by the Orator being in the præter Tense, signified the Action just then past, νυν ομωμοκοτες, as Demosth. Leptin †.

* Leges Hoeli boni, lib. ii. c. 2.

† — ου ψηφιεῖται τις υμων ομωμοκος αλλο τι πλην, οτιαν ηγηται δικαιω. Demosth. c. Meid. ad init.

— τον ορκον ου εισεληλυθεν εκασος υμων ομωμοκος. Æschin. παραπρωστις. 115. Edit. Taylor.

υμας——της ομωμοκοτας της θεης. Demosth. περι Steph. 554.

νυν ομωμοκοτες κατὰ της νομης δικασειν ηκετε. Demosth. Leptin. 46.

After being chose and swore, they took their Seats, and thence were called καθήμενοι, *the Sitting Jury*. Demosth. c. Meid *. So in the same Oration, εαν δε καθιζεσθαι εκελευσε, *if he insisted they should sit*, i. e. *if he desired the Matter should be brought to Trial*.—Again, in the same Place, επειδαν αναση δικαστηριον, *after the Jury rose*.—For the same Reason the Jury in our Law was antiently called *Affisa*, the *Affize*. Bracton uses the Word in that Signification, *Affisam afforciare*, to encrease the Jury; where they could not agree, the Numbers of the Jury were increased †. They had the Name of *Affise* from their *sitting quasi assidentes*—Hence likewise the *Session*, *Sittings* and *Sederunt* in the Law Courts of Scotland.

Being thus sworn and seated, the Place where they were contained was enclosed with a Rope about 50 Feet long ‡, *attended by proper Officers of the Court to watch, lest any Person unobserved should slip in to corrupt them or influence their Decisions*. Archbishop Potter conjectures *this Rope put to keep the Croud from thronging them* ||; but we may with better Reason suppose, that the Rope and Officers were placed there for one and the same Purpose, οπως μηδεις ανυποπλευτος προση, *that no one should mix with them unobserved in order to tamper*

* λογος—ως αν οι καθήμενοι τω λεγοντι μαρτυρουν, αληθεις ειναι. Demosth. Meid. p. 94.

† — Si autem juratores sibi invicem fuerint contrarii, in electione Justiciariorum erit vel *affisam afforciare* per alios—vel eosdem compellere ad *Concordiam*. Bracton, lib. iv. c. 19.

‡ το δε δικαστηριον περισχοινιζετο—το δε περισχοινισμα απο πεντηκοντα ποδας εγινετο. Pollux, lib. viii. περι των Αθηνησι δικαστηριων.

§ οι υπηρεται εφεισηκεισαν οπως μηδεις ανυποπλευτος προση. Ibid.

|| Potter's *Archæologia Græca*, cap. 21. of the Courts of Justice, p. 118. 4th Edit.

with them. This was a Caution very suitable to the Circumstances of the Case; for as we have before seen, it was a common Practice to pack a Jury, *δικαστηριον παρασκευαζειν*; so we may justly suppose, that it was a Part of the same Corruption to interfere in the Verdict, and for them to take Money for their Voice: to prevent therefore any Communication between the enclosed Jury and Persons that might endeavour to influence their Verdict, this Rope and this Guard was set.—We see the very same Caution in effect observed amongst us at this Day; for the Jury is locked up and attended by proper Officers to prevent any Intercourse between them, and any others that might attempt to corrupt or bias them.

Let us stop a Moment and reflect upon this Method of proceeding in judicial Affairs.—What must be the public Character, Denomination and Use of a Body of Men thus described, and acting under these Circumstances?—Were they Judges and presiding Magistrates according to the usual Acceptation of the Word *δικασται*? No surely.—One would think there could be no Necessity for so much Attention to preserve the Integrity of Magistrates presiding in Courts of Justice in the Face of the Sun; and therefore the *δικασται* and *δικαστηριον* thus circumstanced can never be understood to signify *Judges or presiding Magistrates*. But if we consider the *δικαστηριον* as a Body of Men composing a Jury, in the Sense that we use that Word, separated from the Rest of the Court and guarded from any Possibility of Corruption, we may find every essential Circumstance in their Character to be virtually the same, and perfectly agreeable to what is practised with regard to an English Jury: And so striking is the Resemblance between the Office and Duty of both the one and the other, that Archbishop Potter, who in Compliance with common Custom, always called the *δικασται*

Judges,

Judges, when he comes to speak of what was done towards the Conclusion of hearing the Cause, says, *When both the Parties, i. e. the Counsel on both Sides, had made an End of speaking, the Crier by the Command of the Magistrate who presided, ordered the Judges to bring in their Verdict* *. Where directed by the natural Reason of the Thing and the Resemblance it bore to our own Method of Proceeding, he declares them a *Jury* without intending it, and explains what he means by the Word *Judges*, by supposing them to *bring in a Verdict*; which evidently shews that what he called *Judges*, he understood in fact to be a *Jury*; For what *Judges* ever brought in a Verdict? Which in this Case was the Office of the *Jurats*, the *ομωμοκότες* so often mentioned in the Greek Orators.—We may observe also, that he says, *the Crier by the Command of the Magistrate who presided, ordered the Judges to bring in their Verdict*: From whence it appears, that he distinguished between the Magistrate who presided, and the *Judges who were to bring in their Verdict*,—which is the very Point we here contend for; and if it be admitted, then the *δικασται* can be no longer understood to be *Judges*, i. e. *Presidents* of the Court, but of that Sort who are to bring in the Verdict, which in our Police we call a *Jury*, and the Greeks the *ομωμοκότες*, or *Jurats*, from the same Cause of being *sworn* to do Justice in their Verdict.

If this Distinction had been properly attended to by the Translators and other Writers upon the Greek Orators, if the Duty of the *δικασται* had been clearly separated from the Office of the Judge or presiding Magistrate, we should not have seen this Subject so embarrassed as it is, or the *ψηφος* of the *Jury* so often confounded with the Declaration of the presiding Magistrate. It may, however, be of use to take

* Potter's *Archæologia Græca*, cap. 21. of the Courts of Justice, p. 118. 4th Edit.

Notice, that wherever the Orators address themselves to a Jury, they say *ω ανδρες δικασαι*, and sometimes *ανδρες Αθηναιοι*—when it is to the Court of Arcopagus or Senate, *ω βελη*, or *ανδρες βελαιοι*.

When the Cause was before the Court and the Jury seated, the Witnesses were called in, and the Advocates admitted to speak in favour of their respective Clients; each Side, to give the greater Air of Truth to their Case, dressed it up in all the Graces of Eloquence, extenuated some Facts, exaggerated others, lied, dissembled, and in short, sought nothing more than to conceal the Truth and divert the Punishment*. When Æschines accused Timarchus, he applied himself to the *Δικασαι*—*Take Care*, says he, *that those that are to speak for him do not deceive you—Give therefore your Verdict according to Truth and what you yourselves know in your own Conscience†*; and p. 39. upon the same Occasion he says, *There was no Need in his Opinion of Counsel or Witnesses in Matters which they themselves knew so well‡*. This Argument is retorted upon Æschines by Demosthenes, who was Friend to Timarchus—*Do not*, says he in the Passage above-mentioned, *suffer yourselves to be imposed upon by any of these Artifices, but judge from your own Experience and Knowledge of Facts: Give no Credit to what he or I say, or to any Thing proved even by his Witnesses,*

* — *αναισχυντασιν, αρνυνται, ψευδυνται, προφασεις πλατυνται πασα ποιουσιν υπερ της μη δικην δυναι.* Demosth. de falsa legatione, p. 188. Taylor.

† *η πρωτον μιν υμιν μηδεν εγω πισοτερον, ων αυτοι συνις η πεπεισθε περι τουτ' Τιμαρχου—οι δε εν τηδ' ημερα ρηθησμενοι δια την κρισιν, της ημερας απατης ενεκα, αποδοτε εν την ψηφον τω πλειονι χρονω η τη αληθεια η οis αυτοι συνις.* Æschin. c. Timarchi. p. 45.

‡ — *εδεν γαρ ομαι δοκει προσδειςθαι υμιν λογων, υδε μαρτυριας οσα τις σαφως ειδεν αυτος.* Ibid. 39.

which are here ready to swear any Thing under the Direction of Philip their Leader *.

The Use that I would make of these Quotations is to shew, that the δικαστηριον, or Jury, were not strictly obliged to follow Testimony in Cases which fell immediately under their own Knowledge; where Witnesses were the *best Evidence*, there they were to be admitted; but where they were *not the best Evidence*, but the Fact was known to themselves, there they were to follow the Evidence of their own Knowledge and Conscience, as the clearest and most undoubted Proof.

Let us now compare this Circumstance of the Greek δικαστηριον with the Law of an English Jury concerning the same Matter. In the Trials per pais, c. 11. Title Evidence, p. 210. it is said, *That the Jury are to decide the Fact, and Evidence is not given but to inform them in their Consciences of the Truth; for altho' no Evidence is given of either, yet they may give their Verdict one Side or other; and therefore two Witnesses are necessary where the Trial is by Witnesses as in the Civil Law, yet they are not of necessity where the Trial is by Jury.*—Again, Title Proof, cap. 11. p. 164. *According to the Evidence on both Sides, or without any Evidence at all, the Jury are to give their Verdict according to their Knowledge and Oath. Hence it is that the Jury is to be taken out of the Vicinage or Neighbourhood, where the Question about the Fact is moved; and for this Reason, because the nearest Inhabitants thereunto may have the better and more certain Knowledge of the Fact, and therefore can give their Verdict upon their own Knowledge.* Trial

* ——— οὐ βδενι δει παρακροσθηναι τημερον υμας, αλλ' αφ' ον ισε αυτα τα πραγματα κριναι, μηδε τοις εμοις λογοις μηδε τοις τατα προσκειν, μηδε γε τας μαρτυρι, υς αυτος ιτεμας εξει μαρτυρειν οτι εν, Φιλιππω χορηγω χωρμενος. Demosth. de falsa legatione, p. 188. Taylor.

per pais, c. 8. concerning the Visne.—And hence it is, I apprehend, that Lord Bacon, in his Elements of the Common Law of England, says, Regula. 3. p. 22. *That a Jury may take Knowledge of Matters not within the Evidence; nevertheless, it is, not compellable to supply the Defect of Evidence out of their own Knowledge, tho' it be in their Liberty so to do.* This Verdict upon their own Knowledge and Conscience seems to be some Remnant of the old Custom of Compurgation; and we see from Demosthenes and Æschines that the δικασηριον or Jury among the Greeks, were at Liberty to prefer their own Knowledge before any Testimony whatever; and the English Jury being taken out of the Visne or Vicinage seems to be rather from this supposed Knowledge of the Character of the Perfor and Fact than out of any Regard to the Trouble and Expence of bringing them from distant Places, as the Author of the Observations on the Statutes suggests. Statut. Walliæ, 95. Note b.—However, this Resemblance between the Powers of the Δικασηριον at Athens, and the Jury amongst us, joined with the other Particulars before mentioned, may induce us to believe there was something in these Institutions that was common to both, and that there was no other Difference between them, than what arose from Circumstances attending the Polity and Constitution of one Country and the other.

The Manner of giving their Verdict was by Ballot, or what they called ψηφος, which was a little brass Pellet*; each δικασης, or Person on the Jury, had two; the one was bored thro', which was the Token of Condemnation, the other was whole and entire, and was the Mark

* ψηφος δε ειχον (δικασαι) χαλκας δυο, τελευτημενην κ' ατελευτητον. Pollux, lib. viii. περι των Αθηνησιν δικαστηριων. They were called Sponduli, σπονδυλοι εκαλενοαι ψηφοι αι δικασικαι χαλκω πεποιημεναι. Pollux, περι σκευων δικασικ.

of Acquittal. This we learn from Æschines c. Timarch.—*Whoever, says the Cryer, is of Opinion that Timarchus is guilty of Incontinency, let him throw into the Box the Pellet that is bored thro'*; *whoever thinks him not guilty, the whole one* *. It will be proper here to observe the Difference between the *brass Pellets* used in the Dicaſterion by way of ſignifying their Vote of Abſolution or Condemnation and the *Beans*, by which the People declared their Suffrage in the Choice of the Senate and Magiſtrates,---Whence the Senate was called by Thucydides βελη απο κυαμυ, and by Plutarch in the Life of Pericles αρχη κυαμευτης.—From this *Uſe of Beans* in the Election of Magiſtrates, κυαμευσθαι came to ſignify the ſame with πολιτευεσθαι; and whether the Word Πολις, *Civitas*, may not be derived originally from the Hebrew Word פול *Pol faba a Bean*, I ſhall leave to the Learned to conſider. It may not be amiſs, as we are upon the Subject of giving public Votes and the Manner of doing it, to obſerve, that beſides the *Bean* and the *brass Pellet* abovementioned, in the βελη, or Senate of 500, they uſed to give their Votes by *Leaves* inſtead of *Pellets* when they voted a Member out of the Body; which was called, from this Ceremony, εξεφυλλοφορειν; η βελη εξεφυλλοφορησεν αυτον. Æſchin. c. Timarch. p. 51. And Pollux ſays, η βελη 500 φυλλας αντι ψηφων εχρωντο, they uſed *Leaves* inſtead of *Pellets* to vote by. See alſo Harpocration in voce. We read likewiſe in Diodor. Sicul. lib. xi. that the Syracuſians in the ſame Caſes that the Athenians uſed the *Oſtraciſm*, gave their Voice by *Leaves*, which they called, the *Petalifm*.

When the δικαſτηριον, or Jury, had given their Verdict *guilty* or *not guilty* by the ψηφοι or brass Pellets, it was declared by him of the

* Των ψηφων η τειρυπημενη ολω δοκει πιπορευθαι Τιμαρχος, η δε πληρης ολω μη. Æſchin. c. Timarch. 40.

Archons that had introduced the Cause and presided in it.—This Magistrate was called *ηγεμων δικαστηριου*, or President of the Court, and his Office was to admit the Cause to be heard, which could not be without his Approbation, as we have seen before; and when it was admitted, he presided and sat as Chief, as we learn from Harpocration *. Hence we find that the *ηγεμων δικαστηριου*, the President of the Court, for that Turn, was always one of the nine Archons or chief Magistrates who received the Verdict *ψηφους* of the *δικασται*, who in this Instance were sufficiently distinguished from the presiding Magistrate, even in the same Manner as we understand the Office of a Jury to be different from that of a Judge.

But altho' Harpocration seems to confine this Dignity of Presidency to the Archons or chief Magistrates, yet it appears beyond all Doubt that it was exercised also by the *επισταται των εργαων*, the Surveyors of the public Works †. We may observe hence, that tho' the Archon that admitted the Cause and brought it to a Hearing, had the chief Right to preside in the Cause, yet these Surveyors of the Works *επισταται*, in the Absence of the Archon, were the Persons out of whom the Deputy President was to be chose; so that the *ηγεμων δικαστηριου* seems to be the Representative or Deputy of the Archon, in the same Manner as the *Judex Questionis* among the Romans was the Assistant of the Prætor upon the same Occasion, when he was otherwise employed.

* *Ηγεμονια δικαστηριου*—αλλα προς αλλους των Αρχωνων ελαγχανοντο δικαι, τας δε απενεχθεισας αι αρχαι καλα τον αυλον εκαστη νομου, εισηγον εις δικαστηριον ηγεμενη κη προεισωσα. Harpocration voc. *ηγεμονια δικαστηριου*.

† οι δε των εργαων επισταται, παντες ηγεμονια χρονικαι δικαστηριου. Æschin. c. Ctesiphont. 370. Edit. Taylor.

There is a Passage in the Beginning of Lyfias, 2d Orat. c. Alcibiad, for Mutiny and Desertion, where the Distinction between the Δικασαι the Jury, and the Polemarchus or President of the Court is well preserved. *I beseech you, ανδρες δικασαι, Gentlemen of the Jury, that you will give an upright Verdict, and you Judges on the Bench, Στρατηγοι, that you will preside with the same Impartiality towards both the Plaintiff and Defendant in this Cause, as you have done in others**. These Στρατηγοι were the Polemarchus, one of the nine Archons, and his παρεδροι or Assessors, who presided on this Accusation of Mutiny and Desertion, as a military Case, before a Court Martial: So likewise to the same Purpose a few Lines after it is said, *What more infamous Practice and more dishonourable to the State could happen, if we could suppose that, for Instance, in a pupillary Cause, the Archon or President of the Court should take upon him impudently to solicit and tamper with the Jury to bring in their Verdict according to his Direction†*.

Here we see the plainest Distinction between the Στρατηγοι and the δικασαι, the Judge as we call him, or the President of the Court, and the Jury; as also between the Archon and the Δικασαι, whose Verdict the Archon is here supposed to endeavour to influence: Now if we lay aside the Terms, and consider only the Reasoning and the Facts, an English Reader cannot fail of apprehending this whole Transaction to relate to a Judge and a Jury‡.

As

* Εγω μεν ω ανδρες δικασαι υμας αιτεμαι τα δικαια ψηφισασθαι, και των Στρατηγων δεομαι επει και εν τη αλλη αρχη πολλη αξιοι τη πολει γεγονασι, και περι των της ασραλειας γραφων κοιωνων ειναι τω τε διωκουσι και τω φευγονσι. Lyf. c. Alcibiad. Orat. 2. ad Init.

† τι δ' αν αιχιον εθος η δεινολερον πραγμα τβη τη πολει γηνοιτο, ει ταμπησει μεν Αρχων εμβας των επικληρων δικαις, αντιβολειν και ικετευειν τες δικασας ολι αν βεληται πραχθηναι. Ibid.

‡ That the ηγεμων δικασηρις was the Magistrate presiding at criminal Trials, we may infer from the Evangelist Mathew xxvii. 1, 2, &c. using this Word when he speaks

As therefore the *ηγεμων δικαστηριου* was either one of the Archons or some Assessor that presided in his Room, it is evident that the

ανδρες

speaks of Pilate in his judicial Capacity—The Chief Priests and Elders led Jesus away bound, and delivered him to *Pontius Pilate the Governor*, *τω ηγεμονι*, the Chief Magistrate, who sat in Judgment in capital Cases, which the Jews since the Conquest of their Country could not do—Where it is to be noted, that the Jews at that Time using the Greek Language, took their Images and Expressions from the Grecian Customs and Polity.

A remarkable Instance of this occurs also at the 7th Verse of this same Chapter: *And they bought with the 30 Pieces of Silver the Potters Field to bury Strangers in*, *τον αγρον τε κεραμειως εις ταφην τοις ξενοις*—For the better understanding of which, it is to be observed, that at Athens the common Burying-place was called *Κεραμεικος*, *Ceramicus*; which Harpocration in voc. explains of a Place *εξω της πολεως, ενθα και τας εν πολεμω τελευτησαντας εθαπταν*, without the City, where they used to bury the Slain in War, and had its Name *απυ τε κεραμειω* from being a Piece of waste Ground where they threw all Kinds of Filth and Offal, particularly broken Shreds of the Pottery. When therefore the Evangelist mentions the *αγρον κεραμειως*, the Field of the Potter to bury Strangers in, it is to be understood only as an Hebraism for *κεραμεικος*, the Greek Name for a Burying-Ground where the common Dunghill lay; as if he had said, they took Counsel and bought with the 30 Pieces of Silver, a *Κεραμεικος* or Burying-Ground for the Use of Strangers: So Zechariah xi. 13. alluded to in this Passage, is to be understood, *Cast the 30 Pieces to the Potter*, the goodly Price that I was prized at of them:—As if he had said, Cast that mean, scandalous Price that I was valued at to the common Dunghill, or Place of Refuse and broken vessels. Goodly here is to be understood ironically—What is called the Potter, in the Original is, *יֹצֵר* Jotzer, figulus, fingens, a Potter; signifying the Place where the Shreds of broken earthen Pots were cast; which Word being mistaken by the 70 for *יֹצֵר* Otzer, a Treasure, they rendered it *χωνευτηριω* the Mint, instead of the Dunghill of broken Pots.—The same Image is made use of by Isaiah xxx. 14. where he describes Destruction under the Figure of a Potter's Vessel broke into such Pieces, as to be no longer of any Use.—So Psalm ii. 9. *I will break them in Pieces like a Potter's Vessel*, *כִּכְלִי יֹצֵר* Cickli Jotzer, like broken Earthen Ware, that is, useless and good for nothing but the Dunghill.

ανδρες δικασαι were an Institution totally different from the Idea we have of *Judges or Magistrates of the Bench*; and that their Office was to try and give their Verdict or ψηφος upon the Cause, which Verdict was declared by him who presided. Accordingly Sigonius de Repub. Athen. lib. iii. c. 4. says, ubi convenissent Magistratus, actiones in forum introducebant, atque ipsi ei Judicio, præsidebant, et judicibus judicandi potestatem dabant; which is a Translation of what has been before observed out of Harpocraton. It is to be observed here, that what Sigonius says of the Magistrate, *actiones in forum introducebant et ipsi eo judicio præsidebant, et judicibus judicandi potestatem dabant*, is the express Meaning of the Words of Lysias, where he is speaking of the Thesmothetæ, as οἱ τιθεντες τον αγωνα καὶ την ψηφον διδοντες, *appointing the Cause and giving the Ballot to each δικασης or Jury-man to put it into the Box or καδδισκος* *. This Circumstance puts it clearly beyond Doubt, that the Δικασης was no *Magistrate*, but acting under him in some Respect by receiving the ψηφος out of the President's Hand to put into the Box, and thereby giving his Verdict.

What the Ceramicus was at Athens, the Æsquilæ was at Rome, a Piece of waste Ground without the Walls, which was used as a common Dunghill, and where they buried the lower People—

Hoc misera Plebi stabat commune Sepulchrum. Hor. Sat. lib. i. 8.

It was so called, I conjecture, from *Quisquilæ*, because it was the Place where all Kind of Rubbish of the City was cast. In the Chaldean Origin of the Etruscan and Roman Language *Cash Keli* כלי קש signifies *an old broken Vessel*; and it is probable, that the royal Gardens called the Tuilleries at Paris, owed their Name to some such Cause, for *Tuillerie* in the French Language signifies the same with *Ceramicus* in the Greek, a Place where Brick and Tiles were made.

* — καδδισκος μεν εν εστιν αγγειον ω τας ψηφους εγκαθισταν. Pollux lib. viii. περι σκευων δικασικων.

When

When the Verdict was thus given, and declared by the *ηγεμων δικαστηριου*, the *δικασται* or Jury received every Man his Pay, which arose from the Deposit made before Trial by the Prosecutor and Defendant; so that whoever was cast lost his Deposit, which was given between the Jury. This was called *πρυτανεια ωρισμενα* *, and was different according to the Value of the Cause; for if it was in Value between 100 and 1000 Drachms, the Deposit was three Drachms a-piece; if it was from 1000 to 10000, it was thirty Drachms, all which was divided among the *δικασται* or Jury. This Pay was called also *δικαστικον*, as appears from Lucian †, where Mercury advises Justice not to ballot too many on the Jury, lest it should cost too much Money, *μη πολυ αναλίσκεσθαι το δικαστικον*. Pollux speaking of this Deposit of both Parties, and he that was *worsted* *ηττηθεις* paying the whole Expence, observes, that it was appropriated *επι μισθαποδοσια των δικαστων*, to reward the Jury for their Time and Trouble. We see the same Thing in some Degree practised in our own Courts, where when a Special Jury is impanelled on any particular Cause, it is paid for its Attendance.

The Reason for paying the Jury I conceive to be this. At the Time of Solon, the Court of Areopagus and the other Magistracy, as we have before seen from Aristotle, consisted of the Oligarchy and Aristocracy; so that the lower People, who were of neither the one or other of these Orders, had but small Defence against the Violence of the Great, and the Power and Oppression of their Superiors—To remedy which, Solon appointed out of the three

* Vide Pollux et Harpocrat.

Archæologia Græca, c. 19.

† *δισ κατηγορημενος η Δικαστηρια*. Dialog. Luciani.

Orders or Ranks of the People, such a δικασηριον, or Jury, as should at all Times be a Refuge and Protection against arbitrary Power, and in which all the Ranks of Citizens had some of their own Order and Estate to take Care of their Liberty, and guard them in judicial Matters to the utmost of their Power from Violence and Wrong. This is what Aristotle had in View, when he said that Solon was a good Lawgiver, because he took away the Oligarchy, as too arbitrary, and relieving the People that were oppressed, by re-establishing the antient democratic Constitution, and in order to this, appointing the Δικασηρια or Jury to be *chose out of all Ranks of the People**.

About 130 Years after this Regulation in favour of the lower Class (their Attendance on the Δικασηριον being probably found to be inconvenient to them who had little else to subsist on but their Labour and Occupation, which was interrupted by the frequent Calls they had to be present on public Affairs) Pericles appointed the Δικασηρια to take Pay for their Time and Trouble†; and that Poverty was the Cause of the Jury being paid, appears in the same Chapter of Aristotle, where he says, *that the Poor were paid for their Attendance on Juries and public Meetings, but the Rich were not fined for their Non-Appearance*‡.

In the *Bis accusatus* or Dicafteria of Lucian before mentioned, Mercury in the Character of Cryer gives Notice of a Court to be holden in the Areopagus on that same Day. Ο Υες (αχχετε λεως)

* — του δε δημοῦ καταστησαι — τα δικασηρια ποιησας εκ παντων Aristotle. ubi supra.

† — τα δικασηρια μισθοφορα καταστησει Περικλης Ibid. lib. iv. c. 13.

‡ τοις μεν αποροις μισθον ποριζουσιν, εκκλησιαζουσι & δικαζουσιν — τοις δε ευποροις, αδικησαντασι ζημιαν, &c. Aristotle. ibid.

This is, to give Notice, that there will be a Court held in the Areopagus this Day, where Justice herself will draw the Lots, i. e. preside, and the Δικασηριον, or Jury, will be chose out of all the Athenians. The Fee will be three Oboli, and the Number of the Jury, according to the Importance of the Matter in Question.*

The several Particulars here mentioned have been touched on, before, and explained. The Circumstance of the Fee being three Oboli, μισθος τριωβολοι εκαστης δικης, for every Cause, seems not to have been clearly understood by Interpreters, who have mistaken this τριωβολον for the Pay of the Jury or μισθαποδοσια των δικασων. Meursius observes, that the Areopagitæ received the same Pay, the τριωβολος, in like Manner as other δικασαι—And Archbishop Potter seems to approve his Remark by letting it pass uncorrected. But the μισθος τριωβολοι here mentioned in Lucian, does not signify the Pay of the Δικασαι, or Jury, which in ordinary Cases was three Drachms, not three Oboli, but it relates to the μισθος or Fee of the Counsel, as plainly appears by what *Justice in the President's Chair* says (in the same Dialogue) to Mercury, who declares himself too drunk to plead his own Cause; upon which she says, send then for one of those roaring Advocates, for there are many that are ready to burst their Throats for their Fee or τριωβολος †. It appears hence that the τριωβολος was the Fee of the Counsel, and not the μισθος δικασων or Pay of the Jury, which was three Drachms, not three Oboli; which Number Three probably occasioned the Mistake.

As Solon had regulated the Forms of Judicature, and revived the Δικασηριον or Jury in favour of Liberty, and for the Protection of

* Ακσιτε Λεως—αγοραν δικων, αγαθη τυχη κατασπομεθα τημερον.

† — εκουν συνηγορον αναβιβασατω των δεινων τιμην τινα, πολλοι γαρ οι κ' αν επι τριωβολω διαρραζηται ιτοιμοι. Lucianus supra.

the lower Rank of Citizens, all which had an *equal* Right by this System to be chose on the Jury with the chiefeſt Man of Athens, and conſequently by theſe Means had their Perſons and Property ſafe from the Oppreſſion and Tyranny of their Superiors; ſo Pericles improved this Plan of Solon, and not only continued this Privilege of being put on the Δικαſτηριον or Jury, but alſo paid them for their Attendance and Loſs of Time. This he did as the profeſſed Patron of the Democracy, in Oppoſition to the Court of Areopagus, of which, great as he was in all other Reſpects, he never was a Member, becauſe he had never been one of the nine Archons; for the Areopagus was filled up by theſe old Magiſtrates after they had diſcharged their Office*. This leads to a Remark, that the Areopagus did not conſiſt of a certain Number of Members, but was more or leſs according to the Supply from the Magiſtracy of the Archons, which might be uncertain from Death or Diſapprobation on the δοκιμαſια or giving up the Account of their Adminiſtration.

This profeſſed Patronage of the People was perhaps the Reaſon why Pericles never was a Member of the Areopagus; and this laſt might be the Cauſe why, with the Aſſiſtance of Ephialtes, he abridged their Authority and afterwards reduced it to nothing, as being a Species of Oligarchy, and not reconcileable to the Principles of a democratic Government. When we come to conſider the Judicia or Jury among the Romans, we ſhall ſee that it was founded in the ſame Principles of Liberty, and the Protection of the lower People againſt the Power and Oppreſſion of the Great; and what *Solon* and *Pericles* were to the Athenians, the *Gracchi* were to the Romans, the declared Patrons of

* οἱ δὲ ἐννεα ἀρχόντες, οἱ κατ' ἑκάστων ἐνιαυτοῦ μετὰ τὸ δύναι τὰς εὐθυνας αἰετὶ τοῖς ἀρεο-
παγίταις προſτιθεῖντο. Pollux, περὶ τῶν Αῤῥηνησίων δικαſτηρίων.

equal Law and Liberty; for as the Grecian Patriots introduced all Ranks into the *δικαστηρία* or common Jury, so the Gracchi, in Imitation of that Policy, stood up in Favour of the People, and wrested the *Judicia* or *Jury* out of the Hands of the Senate, after they had been in Possession of it for 300 Years, and had used it with intolerable Partiality, Injustice and Oppression—And this Contention about which Orders of the Citizens the *Judices* or *Jury* should be chose out of, was at the Bottom of all those Civil Dissentions that happened between the Patricians and Plebeians, from the Time of the Gracchi to that of Augustus, as will be seen in its proper Place, when we come to speak of the *Judicia* or *Jury* among the Romans.

There is a Circumstance belonging to this Mode of Trial by the *δικασται* or Jury, which tho' not immediately relative to the present Argument, yet deserves to be taken notice of, as a Part of it, and that is, the Time assigned the Advocates *συνήγοροι* to speak for their Clients.

The Accuser had a certain Measure of Time assigned him, the Defendant had the same, and the Jury had their Portion likewise to consider of their Verdict, and bring it into Court. This we learn from Æschines c. Ctesiphon, *The Day of Judicature*, says he, *is divided into three Parts; the first Water (i. e. the Division of Time measured by the dropping of Water in a Clepsydra) was allotted to the Accuser, the Laws and the Public. The second to the Defendant and his Counsel; the third to you the Jury, for your Verdict and other Marks of your Displeasure**.

* εις τρία μέρη διαιρείται ἡμερα όταν εἰσὶν γραφὴ εἰς δικαστηρίον ἐγγχεῖται τὸ μὲν πρῶτον ὕδωρ τῷ κατηγορῶν καὶ τοῖς νόμοις, καὶ τῇ Δημοκρατίᾳ, τὸ δὲ δεύτερον ὕδωρ τῷ τῇ γραφῇ φευγῶντι καὶ τοῖς εἰς αὐτὸ τὸ πρᾶγμα λεγούσιν, τὸ τρίτον τῇ τιμῇ καὶ τῷ μεγέθει τῆς ὀργῆς τῆς ὑμετέρας. Æschin. c. Ctesiphont. p. 441. Edit. Taylor.

Upon which I shall observe, first, that the *ἡμέρα* or *Day* here said to be divided into three Parts, signified in the forensic Language of Athens no more than the *Trial* or *Cause*. This Way of Expression was frequently made use of in many Languages to signify *Judicature*, and the Word *ἡμέρα* by the Greeks and *Dies* among the Romans were used in this Signification, as in the Passage before us, and in *Æschin. c. Timarch. p. 45. They that are to speak in this Cause, τῇ τῇ ἡμέρᾳ, or in the Trial that comes on this Day, are designed to impose upon you**; where they that are to speak in that *Day* signifies in that *Cause*. So *τῆμερον* in *Demosth.* is used in the same Sense, *None of these Considerations should have any Weight with you, τῆμερον, to-day, i. e. in this Cause*; among the Latins likewise, *diem dicere* signified *to sue a Man at Law*†.

It has been before observed, that the Writers of the New Testament with the Greek Language used also the Terms and Expressions that were peculiar to the Athenian Customs and Polity.—Thus *1 Cor. iii. 13. Every Man's Work shall be made manifest, for the Day shall declare it*; the *Day ἡμέρα*, is the *Day of Trial*; So *1 Cor. iv. 3. But with me it is a small Thing, that I should be judged of you or of Man's Judgment, ἀνακριθῶ ἀπ' ἀνθρωπίνης ἡμέρας*—literally, *that I should be judged by Man's Day*, i. e. the Judgment or Trial of Men, as it is rendered in the English Translation. And in *SS. the Day of the Lord*, and *the Day approaching*, and such like Phrases, always had Regard to the forensic Term *ἡμέρα*, *Day*; which, as we have seen in Sacred and Profane Authors, was used to signify *Judgment or Trial*.

* οἱ δὲ τῇ τῇ ἡμέρᾳ ρηθισόμενοι τῆς ὑμετέρας ἀπάτης ἐνεκα. So also *Demosth. παραπρεσβ. p. 216. ἐκείνη τῇ ἡμέρᾳ πάντες λόγοι, &c.*

† — ὡς οὐδὲν δεῖ παρακροῖσθαι τῆμερον ὑμᾶς. *Demosth. περὶ παραπρεσβ. p. 188. Edit. Taylor.*

The next Remark is, that the second Portion of *Water*, or *Time measured by Water*, was appropriated to the Defendant and his Counsel or Advocates; τοῖς ἐπ' αὐτὸ τὸ πρᾶγμα λεγέσιν to those that were to speak in the Cause; which here is called πρᾶγμα the Thing or Cause.—Hence in the Law to prevent the Advocates from running from the Point and speaking foreign to the Business in Hand, it was said, οὐ νομιμον εἶναι τὴν πρᾶγματος λέγειν*; where εἶναι τὴν πρᾶγματος rendered in English would be the same as *foreign to the Thing*: So that a Cause or Law Suit, in the same Sense as the Romans used *Res pro lite*, was called πρᾶγμα a Thing—ἐκρίνετο τὸ πρᾶγμα ἐν τῷ δικάσῃ. Æschin. c. Timarch. 40.—It is well worth our Notice to observe the Analogy that there was between the Greek and the Idiom of our northern Ancestors in this Particular; for what the Greeks called πρᾶγμα a Cause, the Saxons and Danes called a Thing or *litigated Cause*; and the Lawyers *Thingmen*, a Judge *Thingrave*, and the Court, *Hustbing* or the House for hearing Law Causes: Hence the Court of the Lord Mayor of London is called *the Hustings* or *House of Things*, i. e. *Causes*. And as *Thing* and *Cause* signified the same, the Italians and French made their *Cosa* and *Chose* for a Thing out of *Causa*. So that we see πρᾶγμα, *Res*, *Causa*, *Cosa*, *Chose* and *Thing* all had Relation in the several Languages to one and the same Idea. Hence it is that we use the Phrase *Chose in Action* in our English Jurisprudence: And as πρᾶγμα was derived from πράττειν, to do; so the Roman *Actio* for a Suit, was from agere.

It may be observed likewise, that in the old Saxon Charters made to Monasteries, we meet among other Privileges granted to them, the Terms of *Soc* and *Sake*. These were Saxon Words whereby were fig-

* *Lyfias πρὸς Σίμωνά* ad fin. p. 88. Edit. Taylor.

nified the Regalities of holding Courts Baron and Courts Leet; the first of which was called *Soc* or *Soke*, because in it Inquiry was to be made of the Rights of the Lord, which the Homagers were to take Care of and *seek after*; so that the *Soc* was a Court of *seeking out* and preserving the Rights of the Lord in his Manor. The other *Sake* signified in the Saxon Tongue a *Cause* or *Thing*, and the Jurisdiction was therefore called *Sac* or *Sake*, because it had Cognizance of *Matters Criminal* or *Causes* or *Things*; all which were called by the Saxons *Sake*, by the Germans *Sache*, and in the LL. Longobard. *Soga*, as *Si quis Sogas furatus fuerit*, and in Gloss. Græcobarbar. τα πραγματα ηγων τζογες.—As the German *Sake*, a *Thing* or *Cause*, came from *Sagen*, to *say*; so *Res pro lite* among the Romans was formed out of *rew*, to *speak*, or the Subject in Debate or Matter spoke upon. Martinus in Lex Philologic. from Scaliger. voc. *Res*. In like Manner the Hebrews used דבר *dabar*, to signify *Verbum Res aliquid*. Gen. xix. 22. and xxi. 26. which the 70 rendered by *πραγμα*; so the Evangelists and Writers of the New Testament have adopted the same Kind of Expression into the Greek Text, Luke ii. 15. Let us go to Bethlehem and see this *Thing* which is come to pass; where the Greek Word for *Thing* is *ρημα*, the *Word that is come to pass*. So Matt. v. 32. *Saving the Cause of Fornication* is expressed *παρεκτος λογου πορνειας*; where *λογος*, a *Word* or *Speech* properly, is made to signify the *Cause* or *Matter of Fornication*. The same Kind of Expression is to be met with also in the Greek Poets and Orators—Sophocl. Oedip. Colon. Scene 1.—*Αρχει τις αυτων η πι πληθει λογος*—is *the Government here in the Hands of a single Man, or in the People*; where the Government is called *λογος*, i. e. the *Thing* or *Matter*. So Demosth. c. Meid. *εως ημων οντος μονον τε λογου*, not as if the *Matter*, *λογος*, related to me alone.—So that we see the Words דבר *Dabar*, *πραγμα λογος*, *Res*, *Thing*, *Causa*,

Causa, Cosa, Chose, &c. have been promiscuously used for one and the same Idea.

The Time assigned to each Advocate was called his *Water*; hence Demosth. c. Meid.—*If I was to tell you all his Villanies, both our Water (the Time assigned to us both) would not be sufficient* *. And in order to make the most of their Time thus measured by the dropping of Water, whenever any accidental Interruptions happened, such as examining Witnesses, or reciting a Law or Decree, then the Speaking Counsel cried out, *Stop my Water* (μοι επιλαβε το υδωρ †) that it might not be wasted. So many Instances of this Custom frequently occur in the Greek and Latin Authors, that I need not produce any more Authorities.

We have thus far seen the several Circumstances that made up the Idea of the Δικαστηριον or Jury among the Greeks, the Principle on which it was instituted by Solon, its Number, its Powers, the Manner how it was chose, and how it gave its Decisions, from all which we may gather, that it was in its Nature and Operation the same with our Jury—To which an Objection may perhaps be made, supported by common Usage and general Acceptation, that the δικασται were Judges or Presidents of Courts, and had nothing in common with the Idea of a Jury which we suppose; for how unlikely is it, say they, that a Jury should consist of 500, 1000, 1500 or 2000—which has been proved to be the Case of the δικασται; not considering that the Objection lies as strong against the Number, supposing them to be Judges or presiding Magistrates, as it does against the Jury.—I shall therefore endeavour to shew beyond all Doubt that the δικασται were not *Elective Magistrates, or Presidents in Courts, or the Senate*, so that the Reader by the Description that has been given of

* υδ' ει το παρ αμφοτερων ημων υδωρ, &c. Dem. c. Meid. p. 134. Edit. Taylor.

† μοι επιλαβε το υδωρ. Lyfias c. Panceleon. 396.

them will be better able to judge what their Office was. That they were not presiding Magistrates, nor Senate, we have the Authorities of Demosthenes, Lyfias, Andocides, and Lycurgus the Orator. This last, in his Accusation of Leochares, one of the finest Pieces of Græcian Oratory and the only one extant of this great Master, addressing himself to the *αὐτοὶ δικάσαι*, says, *That the due Regard to an Oath was the Foundation and Support of the democratic Constitution, which in Point of Judicature, consisted of three Parts, the Judge, the Jury, the private Man**; each of which gave the Public the Security and Assurance of an Oath for their good Behaviour and upright Conduct in their judicial Capacity, and that very properly and with Reason.— Here we see the Office of the Archon or presiding Magistrate distinct from the *Δικαστής* or Juryman, who tried the Fact; for in this three-fold Description, the Orator had a View to the constituent Parts in a judicial Process—Under a Democracy there was, first, the *ιδιωτής* or Private Man, that is, the Witness, who was so called in Contradistinction to the two others, who were public Characters; he gave Testimony upon Oath; the *Δικαστής* or Juryman was sworn (as we have before seen) to give his Verdict according to Law and Evidence; and the *Ἀρχων*, or presiding Magistrate, was sworn likewise to do Justice on his Part. So that hence we may observe with Certainty that the *Δικαστής* was a Person totally different from an *Ἀρχων* or *presiding Magistrate* in the Signification of our Judge.

It has been observed before, p. 52. out of Lyfias c. Alcibiad, that the Dicastai were different from the Archontes, and the *Στρατηγοί* or Judges in military Causes. So in the same Place we find they are also

* — το συνεχόν την δημοκρατίαν ὅρκος ἐστίν· τρία γὰρ ἐστὶν ἐξ ὧν ἡ πολιτεία συνεστηκεν, ὁ Ἀρχων, ὁ δικάστης, ὁ ιδιωτής, ταῦτων ἕκαστος ταύτην τὴν πίσιν διδωσὶν· εἰκότως. Lycurgus c. Leochrat. sect. 19. p. 205. Edit. Taylor. 8vo.

distinguished from the *Thefmotbetae*.—*I know, says he, how much you would be offended if the Thefmotbetae should offer to interpose in your Verdict; for what could be more heinous, than that the Judge that sits upon the Cause and brings it into Court, and afterwards gives the Bailot to determine it according to Justice, should himself endeavour to influence your Judgment.*—It is to be remarked here, the *θεσμοβηται* or Judges of the Bench are in this Passage said, by way of shewing what their Duty was in that Station, to be *τιθεντες τον αγωνα*, appointing the Cause for hearing, and *ψηφον διδοντες*, delivering the Ballot to the Jury for their Verdict; which plainly shews, that the *Δικαστης* that received the Ballot or *ψηφος* from the Hand of the *θεσμοβητης* could never be the *θεσμοβητης* himself, but that one was the President of the Court, and the other, like our Jurymen, to give his Verdict and Judgment in the Cause: And this is evident from the Words in the next Sentence, *αντιβολειν & ικετευειν τας δικαστας οτι αν βουλεται πραχθηναι*, where the *Αρχων* or Magistrate presiding in the Court is supposed to tamper with the Jury to give a Verdict according to his Direction. What Kind of judicial Process can this Description possibly agree with, unless it be with an Institution analogous to our Jury?

So in the Oration *κατα Πολιευχε*, which was a Case of Confiscation, the Orator addresses himself at the winding up of his Speech to the *Δικασται* or Jury, in Consideration of the Merits of himself and Family that had suffered in the Cause of Liberty under the thirty Tyrants; after which he turns to the *Συνδικοι* or Judges on fiscal Causes, answering to our Barons of the Exchequer; *I ask, says he, those Syndics or Judges (as it were pointing at them on the Bench) that they would be favourable to me, remembering what Opinion they had when they were drove out of their Country by the Tyrants, of those Men that had laid down their Lives in Defence of the Liberty of their Country, and how they prayed to*

Heaven for an Opportunity of one Day or other shewing their Gratitude and Acknowledgments to their Posterity---Now the Time is come; their Sons now call upon you for your Favour, so far only as not to condemn them unjustly, &c. Hence we see, that the *ανδρες δικασαι* were applied to in a different Manner and separately from the *Συνδικοι* * or presiding Magistrates.

We have seen from these Authorities, that the *ανδρες δικασαι* were not the Archons, nor Thesmothetæ, nor the Polemarchus or *Στρατηγοι*, nor the *Συνδικοι* or Judges in fiscal Cases; in short, that they were not *Presidents in any Court*, and consequently ought not to be included under the Idea of *Judges* in the Sense of that Word amongst us, but rather an Institution like that of our Jury.

We will now proceed to enquire, whether the *Δικασαι* had any Resemblance to, or were any Part of the *βελη* or Senate of Athens.—That they were a distinct Body of Men from the Senate (altho' the ordinary Number of the *δικασαι* or Jury, being 500, hath perhaps led some to suppose, that they were the same with the *Πεντακοσιοι* or Senate of 500) we may learn from what has been observed, p. 34. about the Law of Nicomachus made that the *βελη* or Senate should be joined with the *δικασαι* or ordinary Jury, *συνδικαζειν*, to vote in the Condemnation of Cleophon the Patriot. If he had been left to a free *δικασηριον*, the Patrons of Liberty, he would not have been found guilty of the Crime laid to his Charge by the thirty Tyrants, and therefore to make sure Work, they procured Nicomachus to make a Law that very Day the Trial was to come on, without Justice or Precedent, that the Senate should vote in that Cause equally with the *Δικασηριον* or ordinary Jury.—From whence it appears, that the *Δικασαι*

* ω *ανδρες δικασαι*, &c. *αξιω δε κ' τατας της Συνδικας ευνοας ημιν ειναι*. Lyfias κακα Πολιτεχμ ad fin.—We may observe here the Word *αξιω* used in the same Sense as we say, *I ask*; which, in old English, was always wrote *I axe*. *αξιω I axe*.

had nothing in their Constitution in common with the βελη or Senate, who, by an extraordinary Stretch of Power, were in this Case made to interfere with the Duty of the δικάσαι beyond all Custom or Precedent.

I shall offer the learned Reader only one more Argument to shew the Distinction between the δικάσαι and βελη, and that the Duty of the one was quite of a different Nature from the other:---And that is, the Oaths which were taken by the βελη, the Δικάσαι and the Commonalty of Athens, relating to the Amnesty established after the Expulsion of the thirty Tyrants, as they are preserved in Andocides *περι μυστηριων*, p. 12. Edit. Stephan.

That of the βελη or 500 was,

—I will not receive any Indictment, *ενδειξιν*, or Information about any Thing that is past, except the Fugitives.

The Oath of the Δικάσαι on that Occasion was,

—I will not remember what is past, but will give my Verdict, *ψηφισμαι*, according to the established Laws.

That of the Community in general,

—I will forget what is past relating to all my Fellow Citizens except the Thirty, and the Eleven; and will think no more even of them, if they submit and give an Account of their Conduct*.

* Ορκος της Βουλης.

Ου δεξομαι ενδειξιν υδε αναγωγην ενεκα των προτερον γεγεννημενων, πλην των φυγοητων.

Ορκος των δικασων

Ου μνησικακησω, υδε αλλο πεισομαι, ψηφισμαι δε κατὰ της κειμενης νομης.

Ορκος κοινος τη πολει απαση.

Ου μνησικακησω των πολιτων υδει, πλην των 30 κ' των 11. υδε τιτων, ος αν εθελoi ευθυνας διδουαι της αρχης ης ηρξεν. Andocid. *περι μυστηριων* p. 12. Edit. Stephan.

It hence appears, that the *βελη* and *δικασαι* were different Orders of Men; if they had been the same, they would have been comprehended under one and the same Oath—And as the *βελη* or Senate was a Court of Judicature in particular Cases, as appears from the Address to them *ω βελη* in several Orations of Lysias and the other Orators; yet it is to be observed, they never were called (*ω ανδρες δικασαι*) the usual Appellation of the *Δικασηριον* or Jury. In short, the Business of the Senate chiefly was to pre-consider every Motion or Law that was to be proposed to the People, lest any Thing improper or imprudent should be laid before them for their Approbation and Consent*, and in this Respect had some Resemblance of our *Grand Jury*, which by the 25 Edward III. Stat. 5. cap. 4. are to enquire how far an Indictment or Presentment ought to be admitted, before it be sent down to the petty Jury to be tried. Upon the whole, the Distinction made by Aristotle of the several Parts of the Civil Polity of Athens, which he divides into three, plainly declares the *Dicastai δικασαι* to be every Way different from every Kind of Magistracy, Council or Senate: He divides Government into three Parts, the consulting by the Senate or *βελη*—the Executive by the Magistracy, and the Judicial by the *δικασαι*. The first he calls the *βουλευομενον*, the second *το περι αρχας*, the last *το δικαζον*. Aristot. lib. iv. 14. Upon which we may observe, that the *το δικαζον*, the judicial Part of the State, was different from either the Council or Magistracy.

We have thus far seen what the *Δικασαι* were not, for that they were of the Court of Areopagus is not as much as pretended. Let us now see if we can collect from what hath been offered, what they were, by taking a Review of the several Circumstances peculiar to

* Sigonius de repub. Athen. lib. ii. c. 3. de Senate Quingentivirum.

them.

them. They were first of all an Institution in Favour and Support of Liberty, and calculated to prevent Tyranny and Oppression; for this Purpose they were chose out of all the different Ranks of the People of Athens, that in all Trials touching Person, they might be judged by their Peers, to speak in the Language of our own Laws, which in this Case were the same with theirs. In order to prevent all Suspicion of Corruption, they were chose by Lot; they tried all the principal Causes, and the Majority carried the Question; they were increased in Number according to the Importance of the Cause; when they were empanelled they were enclosed by a Rope to prevent all Attempts of Corruption, which, as we have seen above, was often practised. They were sworn on every Cause to do Justice, and determine according to Law, and in Matters before them were allowed to follow *their own Knowledge of the Fact*, and not always to be guided by Evidence; which, as is before observed, was the Case of our Jury; that the Verdict was taken by the President of the Court by Ballot, and declared by him; after which they received their Pay for their Trouble and Attendance, because they consisted for the most Part of the lower People.

What therefore could this important Body of Men, vested with such Powers, imployed in such Causes, Determiners of such Controversies founded in such Principles, Patrons of Liberty, Enemies to Tyranny, and in short, as Lyfias calls them, *πάντων ἐν τῇ πόλει κυριαρχῶντι ψήφος*, in whom the supreme Authority of the State was placed--- What could they be but an Institution which answered to what we call a Jury; since it is evident, that great and powerful as they were in the State, yet they were neither Archons nor Thesmothetæ, nor the Senate nor Areopagites, nor in any Kind of Magistracy whatever.

From this View of the Trial by Jury among the Greeks, which was called the *Δικαστηριον*, and the Persons composing it *Δικασται*, we not only see the noblest Plan of Liberty revived by Solon, where the Subject was tried by his Peers, chose out of his own Rank, among others, and consequently protected from the Power and Oppression of his Superiors, the Antiquity of which Institution among the most civilized People of the World, seems to prove that it was founded in Nature and original Justice---But we learn hence likewise to distinguish with Precision between the Duty of the *δικασται* and that of the presiding Magistrate, without which it is impossible to read the Greek Orators with any clear and exact Ideas; for if we understand by the Word *Δικασται* the *Judges or Presidents of Courts*, every Thing that is said of the Ceremonial belonging to them, such as being *balloted, empanelled, guarded, sworn and paid*, would be ridiculous and absurd; which when applied properly to the *Jury*, would be highly agreeable to the Design and Usefulness of that Institution, which was calculated for the Support of public Liberty, by equal Law and just Decisions, under all the necessary Precautions of *balloting, guarding, swearing, &c.* to prevent as far as could be the least Appearances of Corruption.

If therefore we consider the *Δικασται* in the Idea of a *Jury*, we shall find with what Propriety the Greek Orators addressed themselves to them; whereas if we suppose *that Term* to relate to the presiding Magistrates or Judges, which is the general Interpretation hitherto given of it, it will occasion great Obscurity, by confounding the Characters of two Institutions totally different, and ascribing with the utmost Absurdity the Properties of one Set of public Men, to the other.

AN
 ENQUIRY
 INTO THE
 USE and PRACTICE of JURIES
 AMONG THE GREEKS AND ROMANS.
 PART II.

Of the JURY among the ROMANS.

WE have thus far seen sufficient Reason to believe that the Trial in the Dicafterion, *δικαστήριον*, among the Greeks had all the Properties and Requisites of a Trial by Jury amongst us, and that in Effect it was the same, if we consider it either in its Principles or Circumstances.

Let us now pass on to the Roman Polity, and see whether we can find any Thing in their Plan of Government answerable to this Practice.—It has been before observed in the former Part of this Enquiry, that this Institution of a Jury was the Effect and Consequence of Liberty, and therefore never to be found in a despotic Government; and that it was introduced as a Balance to the Power of the Great,
 8 who,

who, at all Times and in all Countries, have made use of their Opulence as a Rod of Iron to keep under the lower People: For this Reason it is, that we find no Traces of this Method of Proceeding in judicial Matters, in the first Period of the Roman Government under Romulus and the other Kings, because it was meerly monarchical.— And indeed it could not well be otherwise in an infant State just composed of Adventurers and Banditti, who felt not at first the Want of Laws, as having hitherto lived by Plunder and Rapine without them; nor had Abilities to form them, in case they had felt the Want of them.—The Will of the Leader in this Case was the only Law, and his Command directed the civil as well as military Concerns of the Community. Hence it was I am inclined to think, that the Annalist Tacitus says,—*Romulus nobis ut libitum imperitaverat.* Ann. 1. by which he did not mean that arbitrary Power was the Rule of Government from any settled Establishment, but only the unavoidable Consequence in an infant State, where, having no Settlement and consequently no written Laws, or even *Customs* for their Guidance, they submitted to the Determination of their Leader in all their Disputes. But by the Time of Servius Tullius, the Wildness of these Savages was a little civilized, and the Possession of Property, which by this Time they may be supposed to have acquired, made them think of Means proper to defend it against absolute Power or private Invasion. Hence by Degrees they traced Laws for their mutual Welfare and Defence, to be on one Hand a Protection against the Oppression of the Prince, and on the other a Security against the Violence of their fellow Subjects. This also we learn from Tacitus, who in the abovementioned Book speaking of this Period says, *Servius Tullius Sanctor Legum queis etiam Reges obtemperarent*, that Servius Tullius enacted Laws, that even the Kings of Rome should in Time future be responsible and subject to.

I am

I am inclined to think, that this was also the Case of our Gothic Ancestors, who, when they set out upon their plundering Expeditions, knew no other Law than the Commands of their Leader; but after they acquired Settlements by the Division of the conquered Lands, they agreed upon Regulations proper to secure the quiet Possessions of them, which are called the feudal Law, or Law relating to the Tenure of their Feuds or Possessions; by which were stipulated the Conditions of the Tenure, namely, the Services due from the Fees *to the Public from which they held them*, and the reciprocal Defence and Protection of them and their Fee by the Publick. This Law for holding the several Partitions of the conquered Lands, (where every Officer had some Share for his Pains and Peril, and undoubtedly every other Soldier concerned was rewarded with some Part of the Plunder) was not the arbitrary Disposition of the General, but the mutual Concurrence and Agreement of the Whole; and as every Man that had hazarded his Life had a *Right* to some Share of the Prey, so according to their Ranks some had Lands, others had different Kinds of Plunder allotted to them by the Emperor or General, with the Consent and Approbation of his fellow Soldiers. That this was done by mutual Agreement, and not by the arbitrary Act of the General, is plain from hence, that no Individual could have a Right to the Disposal of any Acquisitions which were made by the Courage and Bravery of a victorious Army in common, but by a Power delegated to him, and the Concurrence of the Parties concerned.—The Part therefore that the General acted in the Distribution of the Plunder, Allotment of Lands, and settling the Services due from each, was by general Consent conferred upon him, as *a Representative of the Publick*. From him, *under this Character*, each Tenant agreed to hold his Lands, the Compact upon which Account was *mutual Defence and reciprocal Protection*.

The *Commissioner for the Publick* was to protect the Tenant in all Rights incident to his Tenure, and in Return he was to perform certain Services in Defence of the Publick; *for all genuine and original Feuds were of a military Nature, and in the Hands of military Persons* *. How this Compact was understood we may learn from the Oath and Homage of Robert Earl of Gloster to King Stephen, as it is preserved in Matthew Paris—Comes Robertus fecit Homagium sub conditione, Sc. si illibatam suam dignitatem sibi servaret, secundum illud *antiquum proverbium*—Quamdiu habebis me pro Senatore, et ego te pro Imperatore. p. 51. Edit. Paris; which may be rendered thus: *Earl Robert performed Homage upon Condition that the King would preserve to him his Rights and Liberties uninjured and entire; according to the old Maxim—You shall have me for a Senator as long as I have you for a General.* What was this old Maxim, this *antiquum proverbium*, but the old Law and Custom of the Feudal Tenure, whereby the supreme Lord, i. e. the Public, and the Tenant that held under it, were reciprocally engaged to maintain each other in their Rights. The Tenant was to have Protection and the free Enjoyment of his Grant, without Hindrance or Encroachment; the Public, or the Person representing it and invested with its Interests, was to have such Support and Defence as was stipulated by the Contract; so that the Limits of each being marked out, neither could transgress without Injury to the other, and a Forfeiture of the Tenure on one Side, or of the Right to Fealty and Defence on the other. When therefore the Earl of Gloster did Homage to Stephen, he did it conditionally, and called him back to the original Principles of Government.—So long as you perform the Part of a General, i. e. Sovereign to me, I will be your faithful Senator, i. e. *Subject*.—It is to be observed here, that he

* Blackston, lib. ii. cap. 4. of the Feudal System, p. 57.

does not use the Terms, *Subject* and *King*, but in View of the old feudal Tenure, which was the Origin of the then present Constitution, he tenders Homage, and agrees to be his *Senator* as long as he would be to him an *Imperator*; both which Words related to the original Partition of feudal Property, which was granted by the Imperator or General with proper Protection, and received by the *Senator* or Tenant with the Condition of feudal Service and military Defence. The Words *Imperator* and *Senator* are preserved upon this Occasion to shew that the Origin of the Supremacy of the King, and the Allegiance of the Earl was drawn from feudal Times, when the Prerogative of the Public was lodged in the General or Imperator, and the Homage due to him was from the Tenant of the Fee, who from this *holding immediately from the Public*, or as it afterwards was called *in Capite*, became a Member of the *Magnum Concilium*, where they used to meet once a Year to consult upon the public Good, and whence the chief Tenants were called *Senators* and *Pares Curiae*, which was the Origin of the present Lords in Parliament. To this we may add, that the Oaths taken by the Bishops to King Stephen were on Condition that he would maintain the Church in her Privileges.

From this View of the reciprocal Demand of mutual Duties from the Governor as well as the governed under the feudal System, which was the Origin and Foundation of our present Constitution, we may observe the Equity and Justness on which the political State of this Kingdom is built; for in this Body Politic, as in the natural Body, the Head and Members must co-operate for the Preservation of the Whole, and where there is a Failure of Duty on either Side, it cannot but be injurious to the Community.—Where the Governor protects the Tenant in his stipulated Rights, he is intitled to his Obedience and

Fidelity; where he does not, he has no longer a Demand upon the Tenant in any Shape, nor any Right to his Subjection, having himself first broke the Compact. Accordingly Bracton lays it down as the fundamental Law of our Constitution—*Lex facit Regem*—et non est Rex ubi dominatur Voluntas et non Lex. Again, lib. iii. de Actionibus, cap. 9. sect. 3. *Nihil aliud potest Rex in terris, cum sit Dei Minister et Vicarius, nisi id solum quod de Jure potest; that a King, as the Minister and Representative of God, can do nothing but what is warranted by Law, for Law makes the King; and he is no King, who governs by Will and Pleasure and not by Law.* This Limitation of the Power of the Crown by the Common Law was originally founded in the feudal Constitution, and which our northern Ancestors brought out of their own Country, where it was a standing Law among them, as we learn from Tacitus de moribus German.—non regibus infinita aut libera potestas—*That their Kings had no absolute Power.*

It may be said, perhaps, Where does this Compact appear?—It is to be found in all the Writers of the feudal Law; it is visible in all Parts of Europe, more or less, where the Gothic Model prevailed; it is legible in every Line and Character of our own Constitution, which is no other than a well proportioned and high-finished Structure raised on that ancient and venerable Foundation. In short, it was the very Principle observed by the Romans in sending out their Colonies to inhabit the conquered Lands, which were given by the Public to the People in Consideration of supplying each their Quota of Assistance and Defence for the Preservation of the Whole. Sigonius observes, de antiquo Jure Italiae, lib. ii. cap. 3. de Jure coloniarum—Tributum eos pependisse, et milites ad bellum ex formula misisse—That these Colonies paid Taxes, and supplied their Quota of Soldiers
accord-

according to their Compact. And Livy relates, that after the frequent ill Success of the Romans against Hannibal, twelve Colonies absolutely refused to supply their Contingent of Men and Money, because they said they were so exhausted, that they could do no more either in one or the other Respect. Upon which, the Consuls, willing to deter them from such a detestable Design, (*detestabili consilio*) ordered their Agents to return to the several Colonies, to consider again of their Answer, and to put them in mind that they were not Campanians or Tarantines, but Romans sent from their Mother Country into the conquered Lands for Population, and that therefore they were bound to assist her as dutiful Children; whereas, their Conduct hitherto tended only to betray the Roman Empire to Hannibal. Liv. lib. xxvii. However, after many Remonstrances of Inability in the Colonies to supply what was demanded, the Senate resolved, that by way of Punishment, they should find double the Number of Horse and Foot, and a certain Sum of Money every Year; which if they should refuse to do, they should be put out of the Protection of Rome, and not suffered to appear again before the Senate; whom, when the Colonies found to be resolved and in earnest, they set about what they called before impossible, and did it with great Ease. Liv. Hist. lib. xxvii. and xxix. We may make a Remark or two upon this Passage; first, that the Compact in sending out Roman Colonies was, that in Consideration of a particular Quantity of Land, stated Services were to be returned to the Publick, namely, so many Men and so much Money *ex formula*, by Agreement or Charter: And it is most likely, that when the Gothic Nations came to settle the Lands conquered by them, they took their Plan of mutual Defence and Services due from the Tenure from the old Custom of settling Colonies by the Romans, the Remains of which very probably continued to their Time from the Conquests.

Conquests of Augustus in Germany. The other Remark is, That from hence we may learn what were the Rights that were supposed by the Romans to belong to the Mother Country by the Law of Nature and Nations from their Colonies: We here see, that in Consideration of a certain Quantity of Land, they were to supply so many Men and so much Money for the public Defence; which, from their Example no doubt, the northern Nations copied in the Disposal of conquered Lands which were held by military Tenure, and that where they failed to comply with this Duty, they were to be treated as Rebels, forbid the Senate, and put out of the Protection of Rome; besides which, it was the Opinion of the Consuls, "That they were to be brought to a Sense of their Duty by Severities rather than Entreaty *." From hence we may learn, what was the Opinion of that wise and civilized People relating to the Dependence and Duties that were to be exacted by the Mother Country from their Colonies; and what was a right and just Conclusion then from the Laws of Nature and Nations, cannot now, under the like Circumstances, be illegal or unjust.

This Exchange of good Offices between the Lord and feudal Tenant, tho' founded at first in Necessity and good Policy, yet had so great Resemblance to the Intercourse between Patron and Client among the Romans, that it is not unlikely but it might have been improved from thence; especially when we see that the Aids granted by the Tenant to the Lord by the feudal System were precisely in the same Cases as by the Client to the Patron under the Roman Law, *which were paying the Patron's Debts, ransoming his Person from Captivity, and portioning his Daughter. Erat autem hæc inter eos Officiorum*

* Si legati circa eas Colonias mittantur qui castigent non precentur, verecundiam Imperii habituras esse. Liv. Hist. lib. xxvii.

vicissitudo, ut Clientes ad collocandas Senatorum filias de suo conferrent, in æris aliqui dissolutionem gratuitam pecuniam erogarent, et ab hostibus in bello captos redimerent *.

The feudal Obligation then being thus reciprocal, the Feudatory was intitled to the Lord's Protection in Return for his own Fealty and Service, and therefore the Lord could no more transfer his Seignery or Protection without Consent of his Vassal, than the Vassal could his Feud without Consent of his Lord, it being equally unreasonable, that the Lord should extend his Protection to a Person to whom he had Exceptions, as that the Vassal should owe Subjection to a Superior not of his own chusing †.

Here then is *the Compact*, the Formula, as it is called by Livy. This is that *κοινή συνθήκη της πόλεως*, the common Compact of the State, that *ομολογία*, that mutual Consent, which Aristotle from common Reason lays down as the fundamental Principle of all Law or Act of Legislature in every well regulated Government ‡; for without it no Rule could be Law, it might be Tyranny and absolute Power. Upon this Principle of *Consent and Approbation* in Legislation, no Man is bound by Laws that he has not *virtually* consented to, and by this Agreement, all civil Penalties are Debts to the Public; from whence the Greeks and Romans used *λυειν* and *pœnas solvere* *luere*, for undergoing a Punishment, which was a *conditional Debt contracted* by their own Consent.

* Dionys. Halicarn. de Romulo, sect. 10. P. Manutius de Senatu Romano, cap. 1.

† Blackstone, lib. ii. cap. 4. p. 57.

‡ — ο νόμος ομολογία τις εστιν. Aristot. Politic. lib. i. c. 6.

This feudal Compact being confessedly the Model upon which our Government was originally formed, we see here what the governing Powers of the Sovereign were, and what the Measure of Duty and Obedience of the Tenant or Subject. Here was no *Will and Pleasure* annexed to the Supreme Power, nor any other *Prerogative* then known but such as was necessary for the due Support of the Authority of Government.

Dr. Blackstone observes, that *at the first Introduction of Feuds, when they were held at the Will of the Lord, that he was sole Judge whether his Vassal performed his Services faithfully.* Book ii. cap. 4. Surely this could never be a Part of the feudal Law, that Law of Liberty, this would be giving too great a Power at any Time to the Imperator or Lord to be sole Judge in his own Cause. This is totally repugnant to that Spirit which was the great Characteristic of the feudal Tenure. Accordingly we find in the Laws of Edward the Confessor, confirmed by William the Conqueror in the fourth Year of his Reign, that if any Dispute arose between the Lord and his Tenant about his Land, it was to be determined by the Peers of the Court Baron, or Homagers; consequently not to be left to the Lord *as sole Judge.* The 27th Law runs thus: *Si home volt derainer Covenant de Terre vers son Seigneur par ses pers de la Tenure meismes, que il apellerad a testimoines lestuverad derainer car par Estranges nel pourra pas derainer*.* That if a Man will try the Covenant whereby he holds his Land against his Lord by his Peers of the same Tenure, he must call Witnesses from among the Homagers, and not Strangers. The Reason for this was, because before Writing was in common Use, every Grant was publicly made in Court, and the Peers of the Tenure, i. e. the Homa-

* Vide LL. apud Ingulph. Edit. Gale.

gers, were Witnesses of the Transaction and all the Circumstances attending it, therefore they and they only could be Witnesses of the Conditions of the Tenure granted, and not Strangers. The Evidence of this Grant being thus committed to the Knowledge of the Court, together with the several Conditions of Tenure, in case of any Difference arising between the Lord and Tenant about the Right of Tenure or of Service, which is the Case supposed in the above-mentioned Law, it was determined by the internal *Testimony of their own private Knowledge*; which has been observed before under the Greek Jury, p. 48, 49. to belong not only to the *δικασται* or Jury of Greece, but was also of the Essence of an English Jury, as it is proved out of Trials per pais: To which we may add what Lord Bacon says in the Elements of Common Law, *A Jury may take Notice of Matters not within Evidence*. But the Court cannot take Knowledge of any Matters not within the Pleas, p. 21, 22.—It was, I apprehend, from this internal Testimony of their own private Knowledge used in the Lords Court, that the Custom of *Compurgators* was admitted in criminal Matters; which *Compurgators* I take to be no more than a Jury of twelve Persons, who were allowed to acquit a Person capitally accused, if they swore they believed him innocent from the Knowledge they had of his general Character. This Trial by *Compurgation* appears from the Rolls of Parliament 6 Edward VI. Tit. 33. to be called by the Welsh *Raith*, and the Oath *Llo Reithwr* in Hoel Dda, which signifies the Oath of the *Raithman*; and as the Romans were stationed long in Wales, and their Language much adopted by the Natives, I am apt to believe that *Raith* was a Corruption of *rectus*, whereby the accused was made *rectus in curia*, or restored to his Credit; and if this Conjecture may be thought over-strained, the Reader is desired to consider, whether it was not as easy for the

Welsh to form their *Raith*, as the English their *Right*, from *Rectus*. This Custom among the Welsh, as old at least as the 8th Century, which we see in the Laws of Hoel Dda. lib. iii. cap. 2. seems to have been taken from the feudal Peers de la Tenure, or Jury of the Court Baron, who determined Causes from their own Knowledge and Tradition of the Court; and what inclines me the more to think so is, that the Oath on the Occasion of Compurgation is called *Asach*, which in the Anglo Saxon Language signifies Not Guilty, from *a*, Privative, and *Sake*, Guilt.—Hence the Court Leet, where Causes of Guilt were tried, was called *Sac*, the Court Baron, *Sac* or *Sake* and *Soke*; as they are frequently met with in old Saxon Charters or Confirmation of Liberties.—*Asach* was therefore the Name given to the Oath of Compurgators, from *a Sake*, *Not Guilty*; and it is to be observed, that this Custom of Compurgators was well known among the northern Nations, as appears from Loccenius, Lindenbrogue and Baluze, and therefore it is not at all difficult to conceive the Welsh borrowing a Custom from their Neighbours the Anglo Saxons in England. However, this feudal Custom of the Peers of the Court Baron judging and determining Rights of Tenure by their own Knowledge may perhaps suggest a Reason why the Jurors came afterwards to be chose out of the Vicinage or Neighbourhood, because they might be supposed to have personal Knowledge of the Case to be tried by them; and *not to prevent the Expence and Inconvenience of a Jury's attending at a great Distance*; which is the confirmed Opinion of the Observer on the Statute de iis qui ponendi sunt in Assisis, 21 Edward I. We may observe from this Law of the Confessor, who only continued it with the others from the Code of Canutus, that the Lord had not a Right to be sole Judge in Matters of Tenure between him and his Tenant, but *that* was to be adjudged
 1 and

and determined *par les pers de la Tenure meme*, by the Homagers of the same Court where the Matter in Dispute belonged to. A notable Proof that the feudal Law before the Conquest was a Law of Liberty, and that the Rule of Government was not Will and Pleasure, but equal Law and Trial by Jury, *par les pers de la Tenure memes*, by the Peers of the Lordship. And here we may make a Remark that will be useful to be remembered, that there were two Sorts of *Peers* or *Equals* in this Kingdom; which Denomination took its Rise, as almost every other Custom and Law of Property did, from feudal Considerations *. The Tenants that appeared in the Lord's Court Baron, being

* Under the Saxons by the feudal Law, the Life of every Man, from the King to the lowest Servant, was valued at a certain Estimation. Whoever, therefore, killed any Person, the Punishment was not Death, but a certain *Mult* or *Fine* proportionable to the Estimation set on the Class that the Deceased belonged to. This was called the *Weregilt* or the *Estimation Money*. When the Murderer was tried and condemned, he was to pay this *Mult* or *Gilt*. From whence comes that Expression in our English Jurisprudence, *Guilty or not Guilty*, i. e. is he to pay the *Gilt* or *Fine*, or is he not.

When this *Weregilt* was paid down, it was to be divided into three Parts; one to the King for Breach of his Peace, called *Frittbote*; the second to the Lord for the Loss of his *Servant*, called *Manbote*; the third to the Family of the deceased for the Loss of their Relation, which was called *Magbote*, or *Cengild*, *Kin-money*. Now if the King had a Mind to remit his Part of the Fine the *Frittbote*, he could not give away that of the others, nor prevent the Kindred from receiving their *Magbote* or *Family Compensation*. Hence it is, that in our Common Law the same Distinction is virtually observed; altho' the King can pardon a Murderer, so far as relates to his *Breach of the Law*, yet an Appeal lies from the next of Kin against the Discharge of the Offender, tho' pardoned by the King.—*De homicide sue le prochyn masse du Saunkes del parente cely que felonisement avera ete tue*—The next Male Heir in Blood to him who was feloniously slain, may sue in Homicide, by Appeal. Britton. cap. 24. *Appels de Homicide*.—And in the same Chapter he says, No Woman shall

being *Equals* with respect to the Tenure under the same Lord, and equally bound by the Laws of it, were called *Peers*, *Pares* or *Equals*

of
have an Appeal for the Murder of a Man except her Husband—*De femes volons nous, que nule ne püsse appeller de felonie de mort de Homme forsque de la mort de son baron, &c.* This was also a Part of Magna Charta, cap. 63.—*Nullus capiatur neq. imprisonetur propter appellum femine de morte alterius quam viri sui.*

The Origin of this Part of our Common Law of the Appeal for Murder, notwithstanding the Pardon of the King, is plainly discoverable in the feudal Law above-mentioned; for, according to that, the King had but a third Part of the Witegild or Fine for Murder, which, in case he remitted, the Rights of the Family in their *Mogbote* still remained entire: So under the Common Law, if the King was pleased to pardon a Murderer, the Pardon could extend only to the Offence against the King's Peace and the Infraction of Law, but had no Concern with the Family Compensation; neither could it take away that Right they had to requite at the Hands of the Murderer an Amends for the Loss of their Family, and therefore there still lay a Right of Appeal against the Criminal; notwithstanding the King's Pardon. This *Appeal* did not signify then, as it does now, a Recourse from the Judgment of an Inferior to a Superior Court, which was first resolved in Parliament 50 Edward III. 1377. in the Bishop of Norwich's Case in these Words:—"Errors in the Common Place are to be corrected in the King's Bench; and of the King's Bench in the Parliament, and not otherwise." Cotton's Abridgement of the Rolls of Parliament, sub Ann. But by *Appeal* in the Case of Murder allowed by the Common Law to the next Male Heir, and to a Wife for the Murder of her Husband, is meant a *Complaint made in the Cases aforesaid, with Design to attain the Criminal of Felony*—*Appel est Plaint de Home, fait sur autre ovesque purpos de luy atteindre de felonie, pur mots a ceo ordines.* Britton. cap. 22. De Appels—which by the old Law the Plaintiff was to justify and prove *par son cors, by his Body*, (which was *Duel*), in any Way that the Court would award.—*Et cecy Johan. prist a prover par son cors en toutes les manieres, que la Court vodra agarder que prover le doit.* Britton. cap. 22. De Appels. This Charge, supported with a Declaration of justifying and proving *par son cors, by his Body*, was a Challenge upon the Case; and as the Word *Appel* signified a Challenge in Points of Honour, from *appello* to call upon, or, as we now say, *to call one out, or call*

of the Court or Tenure; and by whom all Causes were to be tried that happened relative to the Tenure. The Lords that held in Capite from the Crown, in Distinction from these Under-Tenants, were called *Peers of the Land*, by whom all Causes relating to Tenancy in Capite, *i. e.* between the King and them, were to be adjudged.

call one to an Account; So this Writ at the Motion of the Prosecutor was called *Appel* or Challenge, by which he offered to prove *par son cors* the Truth of the Fact; so that the Word *Appeal*, in the Sense it is now mentioned, signifies a Writ of Challenge to prove such an one guilty of a certain Murder; *Body for Body*.

This Custom of Trial favoured too much of our antient Barbarity to be often admitted to be practised, and therefore Glanville says, *That the Grand Assize or Trial by Jury, was by the royal Favour and Clemency of the Prince* (meaning Henry I.) *substituted in the Place of Duel, for the Prevention of Bloodshed and the Good of the Public.* Est autem magna Assisa regale quoddam beneficium, clementia principis de consilio procerum populis indultum quo, *vita hominum et status integritati* tam salubriter consulitur, ut in jure quod quis in libero soli tenemento possident retinendo, duelli casum declinare possunt homines ambiguum, &c. Glanville de *Leg. et Consuetudin. Angliæ*, lib. ii. cap. 7. It was in order to civilize this brutal Disposition of the northern Nations, that the Popes Eugenius 1150, and Innocent III. 1190, prohibited the Methods of *Trial by Duel, Fire and Water Ordeal*, which was followed by Waldemar King of Denmark about 1350. Trial by Ordeal was prohibited 1219 at Westminster, 2 Henry III. and in Scotland by Alexander II. about the same Time.—No Judgment nor Dome shall be don, by *Water or Fire*, as has been used in auld Times. Cap. 7. *Leges Alex. II.* But these mild Substitutions and humane Prohibitions were not relished by the northern Ferocity, and therefore obtained amongst them by very slow Degrees. The last Account we have of Trial by Duel in our own Country, and which ended not in actual Combat, was in Charles the First's Time, as appears from Observations on the Statutes, p. 183. We have here seen in this Instance of the *Appeal for Murder*, how our Common Law and Magna Charta took their Rise from feudal Customs. And the Statutes of Westminster prim. 2 Rich. II. 12 Rich. II. relating to the Punishment of those that tell slanderous News, are drawn from the old Law of Alfred, whereby, *falsos et seditiosos rumores spargentibus linguæ præcidantur*; *Those that spread false Reports had their Tongues cut out.*

Thus

Thus the Commonalty of the Lordship were to be tried by the other Tenants, their Peers; and the *Lords of the Fees* by the other Lords who were their Equals or Peers. Hence it was, that when this Right of being tried by their Peers was invaded by the Norman Kings, they cried aloud in the Time of King John for their old Anglo Saxon Liberties to be restored them, amongst which was that *Legale Judicium Parium suorum*, which we now call a Jury, or Trial by the Judgment of their Peers. As therefore the Lord could never be supposed to be *sole Judge whether the Services performed by the Tenant were faithfully discharged*, not even when Fees were held *at the Will of the Lord*, because we see it was to be tried by the Peers of the Tenure or *Jury of Homagers*, and was absolutely repugnant to the first Principle of the *feudal Tenure, Liberty*: So we may likewise observe, that what is called the *Will of the Lord* was not an arbitrary uncontrouled Power of acting against his Tenants, but a Distinction between the Land which was conveyed by Charter and made hereditary, and *that* which was held by no certain Conveyance, but barely by the Consent and Permission of the Lords: In this Sense therefore it was said to be held *at the Will of the Lord*, and that Will of the Lord was to be interpreted by the Custom of the Manor, that is, by the Judgment of the Peers of the Tenure*: And Ritterstrusius in Notes upon Gunther's Poem on the Roncalia takes notice, that those which Gunther calls *Fideles* were the Vassals, and the Court were *Pares Curia*—Nam, says he, *si lis sit de feudo inter Dominum et Vassallum, ejus litis Judices sunt Pares Curia*, i. e. *ejusdem Senioris alii Vassalli*; *Dominus enim in propria Causa Judex esse non potest*. Thus we see, that the Head of the feudal System had no absolute Power independent of the capital Tenants, and that the Name of *Chief* did not belong

* Blackstone, lib. ii. c. 6.

to him naturally as a Man, who bore that Title on his own Account, but like the Thesmothetæ and other Magistrates, as is before observed out of Demosthenes, it was the Name of his *political Capacity*, it was *ονομα της πολιως*, the Name of the Public, with whose Powers he was clothed, and which he had no Right to any longer than he discharged the Duty that was annexed to it. Let us hear what Sir Edward Coke says upon this important Subject:—*In the Reign of Edward the Second*, says he, *the Spencers, Father and Son, to cover the Treason hatched in their Heart, invented this damnable and damned Opinion, that Homage and Oath of Allegiance was more by reason of the King's Crown, that is, his political Capacity, than by reason of his Person. Upon which Opinion they inferred these execrable and detestable Consequents; 1st, That if the King doth not demean himself by Reason in the Right of his Crown, his Lieges are bound by Oath to remove him; 2dly, Seeing the King could not be reformed by Suit of Law, that ought to be done by Aspertee, i. e. by Force; 3dly, That his Lieges are bound to govern in Aid of him and in Default of him**. But damnable, damned, execrable and detestable as the good Man thought this Opinion to be in that Reign, when he joined the Parliament in the next, he thought proper to disclaim, at least by his Speeches and Conduct, the Severity of this Censure.—*Quid verba audiam cum facta videam. Cic. Tusc. 3.* However, it is a Question whether there has ever been an intelligent and candid Lawyer since the Revolution, but would have subscribed the Opinion of the Spencers and condemned that of Sir Edward Coke, who, tho' he was looked upon as the Oracle of our Law, yet we see he could *Jacobize*, as that at Delphos did *Philippize*, that is, basely flatter Power at the Expence of Truth.

* Coke's Reports, Calvin's Case.

It has been observed above, that no Man is bound by Laws which he does not virtually consent to; and when once they are made, they cannot be abrogated or changed but by the same Consent that made them.—But in Breach of this fundamental Law of Nature and Nations, Lord Bacon, in the same Reign and with the same View, lays it down as Law—*That it is an inseparable Prerogative of the Crown to dispense with political Statutes* *. If this Doctrine was any thing more than servile Complaisance to arbitrary Measures, we should have found this *dispensing Power* co-eval with the feudal System; but unhappily for this Prerogative Lawyer and his Assertion (for it never could be his Opinion) we know the Birth of this dispensing Claim, have solely felt its Progress, and seen with Pleasure its Death and Burial at the Revolution, a Period that will be for ever dear to this Nation for the Restoration of its Liberties, and a Consequence that followed thereupon, the Settlement of the present Royal Family upon the Throne, as the Guardians and Protectors of them for the future. The Clause of Non obstante was first introduced into the Orders of the King 1251, 34 Hen. III. in Imitation of the Pope's assuming that Power of dispensing which began 1245, in the same Reign, and in the Time of Innocent IV. We see, therefore, that this *dispensing with Laws* was so far from being a *Prerogative inseparable from the Crown*, that there was a Time, not above 250 Years before this Opinion, that the Crown knew nothing of such a Prerogative; and so far was it from being true and founded in Law, that it was the Offspring of Tyranny, and the Produce of that inauspicious Reign that for upwards of fifty Years was no other than one continued Invasion of the legal Rights of the People.

* Bacon's Elements of Common Law, p. 68. Regula 17.

When

When the Law of Tenure and Services was settled upon this Footing by our Saxon Ancestors, they proceeded by Degrees as Occasion required, to agree upon such further Rules as were necessary to the internal Government, the Regulation of the Manners of the Community, and the mutual Protection of each other upon the Footing of Equality and Liberty. They knew no Superior but the Public Good, *i. e.* the Person appointed by themselves to take Care that the Community suffered no Damage, and to whom they had delegated proper Powers for that Purpose at their annual Conventions, which being an Assembly of the Tenants of the chief Fees composed of the *Pares* or *Peers of the Land*, was the Origin of our Parliaments.

At these Conventions every one that held a Fee in Land under the Public, for which he was to perform particular Services chiefly military for the Defence of it, appeared as a constituent Part, and consulted upon such Measures as were most conducive to the Peace, Happiness and Prosperity of the Whole. This was the Foundation of the Saxon Wittenagemot, the Members of which, according to the Quantity of their Tenures, were called Eorles or Thanes, which, under the Norman Regulations, were changed into Counts and Barons. This then was the Basis of that Constitution we live under at present, a few Alterations excepted which arose from the Circumstances of the Times, and the farther Extent and Mode of Property; for when the Lands of Conquest were divided into Lots and Shares and distributed among the *Capitains*, who were so called from holding their Lands immediately *in Capite*, or *Chiefs*, from the Tenure *En Chef*, which is the same in French as *in Capite*, they met as Representatives of their Fees to take order for the good Government of the Public, as hath been before observed: But when this Kind of Tenure

ceased by Degrees, or at least was altered, and Possessions were held by other Rights, and Property became more diffused, it was impossible but Alterations in the Constitution should follow, where the Manner of possessing Property was changed. This was what gave Rise to a third Estate in Parliament, and the Admission of the Commons into the Legislature.

From this View of the old Constitution of this Country, founded intirely in the feudal Tenures by our Anglo Saxon Ancestors, from whom we derive both our Laws and Liberties, I cannot but be surprized at the Assertion of the learned Author of Observations on the Statutes, p. 59. *That feudal Tenures were not known to the Saxons, a Proof of which is, that they had no Terms for such Tenures.*—What were the Terms of *Socage*, *Burgage*, *libera Eleemosyna*, called afterwards by the Normans *Frankalmoine*, *Gavelkind* *, but Terms of Tenure among the Saxons? What were the Names of *Eorl*, *Thane*, *Vavassors*, but Terms of Tenancy and holding Fees †. What were the 60,000 Knights Fees, which were converted into Baronies by the Conqueror, but Fees held by *Knights Service* in the Saxon Times ‡ or *feodum militare*; and a *Knecht* in their Language signified a *Souldier* or *military Servant*, and in this Signification, to make a Man a *Knight* was to make him a *Souldier* or *military Man*. A Thane in Domesday, Berochescire, in burgo Walingeford, is called Miles regis Dominicus.—The Passage runs thus: T. R. E. (tempore regis Edvardi) Tainus vel miles regis Dominicus moriens pro Relevamento dimittebat regi omnia arma sua et equum cum sella alium sine sella.—So that a Thane was one that held by military Service in the Time of the Saxons, and

* See Blackstone, lib. ii. c. 4, 5, 6. † *Degen* or *Thanes*, a *Dienen*, ministrare. Seld. ad Eadmer. ‡ Seld. Tit. Honour, under Barons.

when he died the King took for a Relief *bis Arms*, and a Horse saddled, and one without a Saddle. By the Relief, *which were bis Arms and bis Horse*, it plainly appears, that the Thane held by *military Service*. Under the Normans, the Tenure of Tainlands or the Fees of a Thane were changed into the Tenure by Barony, which only was the Norman Name, instead of the Saxon, for the same Thing: Accordingly we find in the Laws of the Confessor, confirmed by William the Conqueror in the fourth Year of his Reign, and which he declares to be the Laws that were in Use by his Cousin Edward, as the Title in Ingulphus declares—*Ces sont les Leis et les Custumes que le Reis Will. grantut a tut le peuple de Engleterre apres le Conquest de la Terre. Ice les mesmes que li Reis Edward sun Cofin, tint devant lui—Co est a Saveir, &c.* In these Laws the Relief of a Baron was the same *in Kind*, tho' different *in Degree* only; for as the Thane's Relief was his Arms, and one Horse saddled and one not saddled, so the Relief of a Baron (which we see settled here so soon as the fourth Year after the Conquest, which observe) was his Arms, and four Horses saddled and bridled. The Article in the Original is this: *De Releif a Barun 4 Chivalz enselez e enfrenex, e 2 balberz, e 2 haumes, e 2 escus, e 2 launces, e 2 espees, e les autres 2, un cbaceur e un palasfrei a freins e a chevestres.* So that altho' we meet here with Norman Terms of Tenure, yet the Things were the same as under the Saxon Tenure, and the Laws the same as the Confessor's in the Main; the chief Difference being the Change of *Egri* for *Cunte*, and *Tbein* for *Baron*, with such Increase in the Quantity of the Relief as made them know they received Law from their Conqueror.

This Mistake about the Time of the Origin of feudal Tenures in this Country, seems to have arisen from the Authority of Sir H. Spelman,

man, who expressly says in his Glossary, voc. Feudum—feudorum servitutes in Britanniam nostram primum invexit Gulielmus Senior Conquestor nuncupatus—innuit huc ipsum Domestici Tit. Gloucestre, Episc. Baion. Estrigole—Wilhelmus de Ow. habet in Wallia tres Piscarias, in eodem feudo 50 Carrucat Terræ, sicut in Normannia; feudum et Normanniam jungit, ac si rei novæ Notitia Normannia disquirenda esset; deinde resonarunt omnia feudorum gravaminibus, Saxonum ævo ne auditis quidem.—The Answer to which is, that Lands were held under the Anglo Saxon Government by feudal Services, such as *Palatine*, *rural*, and *military*; the Tainlands were held by military and often other Kinds of Service, the Demean Lands by rural Services, and we have seen the Thanes were Tenants by Service, as their Name imported. Selden tells us, that for Tainlands, which were honorary Possessions, the Word *Baronie* was used*.

Upon the whole the Truth seems to be, that when the Danes about the Middle of the ninth Century came into France, and settled in the Country that from these northern Adventurers was called Normandy, they brought with them the old feudal Customs of their Country, and used them as the established Law: And when William the Bastard, two hundred Years after, conquered England, he made no fundamental Alteration in the Laws of England (for in the fourth Year of his Reign, as before mentioned, he granted and confirmed the Laws of the Confessor, which were the old Anglo Saxon Laws) but gave new Terms to old Customs; and what they called *Eorl* and *Thane*, he, according to the Custom of Normandy, called *Count* and *Baron*; besides which, he exacted harder Terms of Tenure than the feudal Tenants had been used to, as hath been observed before in the

* Titles of Honour.

Matter of *Relief* under the Anglo Saxons and Normans. We see, therefore, that Services, and even military Services, were the Condition of Tenure under the Anglo Saxon Government in England; and why it should be otherwise no Reason can be given, seeing that upon the Decay of the Roman Empire, the northern Nations by Degrees became possessed of all the Kingdoms of Europe, and introduced universally feudal Tenures and feudal Laws wherever they settled. When therefore all Europe was held by feudal Tenure and governed by feudal Laws, in Consequence of the Incursions of the northern Nations, why should England alone be exempted from the common Condition imposed by the Conquerors on all others that held under them? In short, what was the *Wittenagemot*, the *magnum Concilium* among the Anglo Saxons, but an Assembly of feudal Tenants in Capite, who appeared at the annual Convention in Virtue of their Fees and Possessions which they held, under particular Services reserved to the Public from which they held them, to consult and enact such Laws as were necessary for the Welfare and good Government of the whole Community. These feudal Assemblies for the same Purposes were every where observed thro' all Europe; in France they were called the *Champs de Moy*, because of their Meeting at that Season, and *Roncalia* in Italy, because the Vassals used to meet the Emperor when he went to Rome at that Place on the Banks of the Po. But the Nature of that ancient Institution is best preserved at this Day in the *Diet* of Poland.

When therefore it is said, that *feudal Tenures or Services were not known to the Saxons, or that the Conqueror first brought them into Britain*, no more surely can be meant than that the Baronage and Severity of Services introduced and enforced on the English by William the

the Conqueror, were not known before *in that Extent and in that Form to the Saxons*. This feudal Tenure the northern Nations learnt from the Manner of sending out the Roman Colonies into conquered Countries, where the Souldiers and others were settled upon Condition of defending them for the Public. These Lands were called *Beneficia*, which Word signified a Reward for their Services, and was afterwards aptly enough expressed by the *Fe-odb* of the Saxons, which, like the *Beneficium* of the Romans, implied a *stipendiary Property or Possession given as a Reward of Service*.

I have been insensibly led into this short Account of the Origin of English Liberty and Law, founded in the ancient feudal Tenures of our Gothic Ancestors; which Possession of Property made them take all possible Precautions for the quiet and uninterrupted Enjoyment of it. But we need not go so far back as our Gothic Ancestors, or the first Romans, to learn that the Possession of Property was the immediate Source of Liberty, and the Origin of a Jury; we may turn our Eyes to the Norman Conquest, and see that Truth in the strongest and most striking Light; for when William the Conqueror, as he is called, under Pretence of his Conquest seized all the Riches of England that he could get at, he divided them to his chief Officers under the new Tenure of Barony; so that Ingulphus, who lived at the Time and was a Favourite of the King, could not help complaining in his History of Croyland of the Imprisonments, Banishments and other Hardships inflicted on the Bishops and great Men that had opposed him. He then concludes, *deinceps ergo Comitatus et Baronias Episcopatus et Prælatias totius Terræ suis Normannis Rex Wilhelmus distribuit, et vix aliquem Anglicum ad Honoris Statum vel alicujus Domini principatum ascendere permisi* *—That he gave all the Earldoms, Baronies, Bishop-

* Historia Ingulphi sub ann. 1066-7. p. 70. Edit. Gale.

ricks and Dignities to his Normans, and scarce admitted an Englishman to any Place of Honour or Command. And Hemingford says, that the King seized all the Money that had been deposited by way of Safety in the Monasteries by the rich Men of the Kingdom *. Under all this Opulence and the Power that attended it, they soon began to feel their Importance, and think how to prevent that Hand that raised them, from as arbitrarily pulling them down.

Four Years had not passed before they called aloud for the Restoration of the Laws of Edward the Confessor, which the Conqueror thought proper to confirm †. Afterwards from succeeding Kings they obtained Recognitions of the old Saxon Laws and Charters of Liberties founded on those Laws and ancient Customs, till at last the Grandchildren of those first Norman Spoilers, who had stript the English of their Laws, Liberties and Possessions, became the Patrons and Champions of the Magna Charta, one Article of which was the Trial by

* *Rex autem in Anno 1070, in ipsa quadragesima Monasteria totius Angliæ perscrutari fecit, et pecuniam quam ditiores Angliæ propter istius austeritatem et depopulationem in eis deposuerunt auferri iussit.* Cronica Walteri Hemingford, cap. 4.—This Passage in Hemingford, who lived in the Time of Edward III. he took out of the History of the Church of Ely, written about the latter End of the Reign of Rufus. Which see in the 15 Scriptores, Edit. Gale. Vol. I.

† LL. Edwardi Confessoris confirmavit Will. Conquestor, anno regni sui quarto, 1070. Seld. Not. ad Eadmer.

Gulielmus primus dicitur Londinum anno suo quarto invocasse omnes e provinciis suis universos, Anglos nobiles sapientes et lege sua eruditos, ut eorum et Jura et consuetudines ab ipsis audiret. Rog. Hoveden part. post. fol. 347. Edit. London.

So likewise the Title of the Laws themselves in Ingulphus declares—*Cel sont les Leis et les Custumes que le reis William grantut a tut le Peuple de Engleterre apres le conquest de la terre.—Ice le meismes que le reis Edward sun cosin tint devant lui.*

Jury,

Jury, which had been an old Custom under the Saxon feudal Tenure, as we have before seen it in the Laws of the Confessor.

This new System of Tenure by Barony Dr. Blackstone supposes not to have been introduced into England *soon after the Conquest*, nor by the *meer arbitrary Will of the Conqueror*, but by the Consent of the Council or Parliament that met him at Salisbury, in the last Year of his Reign, when he was going over to France. Blackstone, lib. ii. cap. 4.

This Observation, I think, is not made with the Doctor's usual Exactness; for in the Laws of the Confessor, confirmed by the Conqueror in the fourth Year of his Reign as is before observed, we find the Substance of some Anglo Saxon Laws, but the Language and Terms were Norman. Can it be supposed that he would make use of the Terms *Barons* and *Counts* in those Laws, if the Names of Barons and Counts were not established and well known? How could the Relief of a *Count* or *Baron* be understood, if these Terms had not been ascertained at the Time of the Confirmation of the Laws of the Confessor by the Conqueror in his fourth Year; besides, we are told expressly by Matthew Paris, Anno 1070, which was the fourth of the Conqueror, *Rex Wilhelmus Episcopatus et Abbatias omnes quæ Baronias tenebant, et eatenus ab omni servitute seculari libertatem habuerant, sub servitute statuit militari, innotulans singulis, &c. pro voluntate sua*—that in the fourth Year of his Reign he obliged all Bishops and Abbots to hold their Lands, hitherto free from all Service, by military Tenure, appointing the Number of Soldiers each should supply *by his own Will and Pleasure*; observe *pro voluntate sua*. We have likewise seen above the arbitrary Disposal of the Honours and Dignities which were taken from the English and distributed to his Followers; to which we may add the Plunder of the Monasteries, where

where the vanquished endeavoured to conceal their Money and valuable Moveables. Under these Dispositions of Severity and Violence it is most natural to believe that William introduced the Change of Tenures as soon as he could, and that when he invested his Followers with the Lands and Dignities of the English, he did it after the Manner of their own Country, changing the Title *Eorl* for *Count*, and *Thein* for *Baron*, and calling these Tenures by military Service, by the Norman Name of *Baronies*. Besides, it is not likely that so politic and jealous a Prince should leave the Settlement of this new Acquisition to the last Year or two of his Life, and that to be done in a Parliamentary Way by Consent, when every Thing else was carried with a high Hand, and disposed by the absolute Will of the Prince. To this we may add, that in Domesday, which was compiled before this Council of Sarum, we read of the Barones in many Passages, viz. Title Dorset.—*De partibus aliorum Baronum sunt ibi 20 Domus stantes, et 60 destructæ. In Burgo de Warwic. Barones regis habent 112 Domos, &c.* And this by the way confirms an Observation of Hemingford relating to the Cause and Intent of the Survey of Domesday. He says, *Cronic. ad ann. 1086. cap. 10.* that it was taken in order to know, *quantum terræ quisque Baronum suorum possidebat—How much Land each of his Barons held under him.* This plainly shews that *Baronies* were instituted before the Beginning of taking the Survey, which lasted three Years; and it is very reasonable to suppose, that the Barons had been some Time before in Possession of their Fees under that Name: from all which we may conclude, that the *Baronies* were introduced into England soon after the Conquest, at least before the Council of Sarum, and by the King's *arbitrary Will*, rather than the *Consent of the People*. We see thus, that neither the Goths nor the Normans in England ever thought of Liberty, when

they had nothing to lose; but when they became possessed of what was valuable, they had Recourse to such Measures as were most likely to secure them the free and unmolested Enjoyment of it.

Such also was the State of the first Romans, with respect to their Laws, during the greatest Part of the kingly Government, under which the Will of the Prince was the chief Law for Want of others: But when the despotic Behaviour of the regal Family grew obnoxious, and the Son of Tarquin, as Tacitus says of Domitian, *stupris et adulteriis filium principis agebat, distinguished himself only by the Excess of Debauchery and Adulteries*, the Alarm that first affected the Honour of their Families reached at length to every other valuable Concern, and laid the Foundation of that great Revolution, which made way for the Roman Commonwealth and Consular State, which was built upon *Equality and Liberty*.

The Want of a regular Establishment, and Inability perhaps in those Times of Confusion and Inexperience to frame one, was the Reason why at the Beginning of the Commonwealth they sent Ambassadors to Athens, praying a Transcript of the Laws of Solon, which were grown into great Repute, not only from their intrinsic Worth, but also from being accommodated to a popular Government, such as was now proposed to be introduced among the Romans, and wanted all Assurances against the ejected Party of Tyranny and arbitrary Power: And to what Height that had grown under the last Tarquin, we may judge by the Sketch that is given by Livy, who saith of him, *cognitiones capitalium rerum sine Consiliis per se solum exercuisse, propterque eam causam occidere, in exilium agere, bonis mulctare, potuisse—non suspectos modo et invisos sed unde nihil aliud quam prædam sperare poterat—*

That Tarquin sat as sole Judge, without any Assessor or Counsel in capital Trials, the Consequence of which was, that he had it in his Power to kill, banish, or confiscate the Estate of whomsoever he pleased; and that not only of those that were obnoxious to his Suspicion and Resentment, but in short all others from whom he was in Hopes of getting any thing by Confiscation. And as a farther Instance of arbitrary and tyrannical Proceedings, he adds, per se ipse cum quibus voluit fœdera societatis injussu populi et Senatus fecit diremitque—That by his own Authority, without the Consent either of the Senate or People, he made Leagues of Amity and Friendship, or broke them just as he pleased himself. To which we may add out of Dionys. Halicarn. that he determined Matters in Judgment not by the Laws and Justice, but according to his own Will and Pleasure; and besides all this, he abolished all the Laws that Tullius made in favour of the People, and the equal Distribution of Right and Justice which was due to all Ranks even the lowest †.*

This State of Tyranny and absolute Rule could not last long: Accordingly the People who felt the Effects of it, laid hold of the Pretence of his Son Sextius's Debaucheries to declare against the Violence and arbitrary Conduct of the Father, and at the same Time to put an End to regal Power. A new Plan of Government succeeded; in which they took Care to guard against any such Enormities for the future, by grant-

* τὰς ἐπικρίσεις οὐκ ἐπὶ τὰ δίκαια καὶ τὰς νόμους, ἀλλ' ἐπὶ τὰς ἐαυτοῦ τρόπους ἀναφεῖν ἐποιεῖτο. D. Halicarn. in Tarquinio Superb. p. 237. Edit. Hudson.

† τὰς δὲ νόμους τὰς ἀπὸ Τυλλίου γραφέντας, καθ' ὅς ἐξ ἴσου τὰ δίκαια παρ' ἀλλήλων ἐλαμβάνον πᾶσις ἀνείλε. Ibid. p. 236.—Observe here, that equal Justice, ἐξ ἴσου τὰ δίκαια παρ' ἀλλήλων, was the first Principle of Liberty among the Romans as well as the Greeks.

ing to their chief Magistrates such Powers only as were consistent with Liberty and the public Welfare. We can make no Doubt but that they who had felt so severely the Scourge of *Will and Pleasure* in their judicial Proceedings, as is above observed, made the best Provision they were able against any Partiality or Corruption in the like Respects; and there is all Reason to think, that the Regulation about the equal Distribution of public Justice with Uprightness and Impartiality engaged their first Attention, particularly because, as we have seen above, Tarquin had abolished all the Laws of Tullius that had been calculated for the salutary Purposes of equal Law and universal Justice to all Ranks.

We may here justly place the Date of that Institution, by which all capital Causes were to be tried by a Number of disinterested Men, in Opposition to the sole Decisions of an arbitrary, avaritious or revengeful Prince, which they had so lately and so unhappily experienced. Brutus indeed, as being one of the first created Consuls with supreme Power, sat as sole Judge upon the Party of Tarquinius and his Followers, because there was no Time in that Confusion to make new Laws and Ordinances to this Purpose, it was necessary therefore to proceed against them according to the usual Forms, which they could have no reasonable Objection to, as having used them when they themselves were in Power. But when the Troubles began to subside, Valerius, the other Consul for the Year, took away that Power of judging solely and finally in a capital Case, by a Law *de Provocatione*, whereby it was enacted, *That no Consul for the future should judge a Citizen in a capital Case without the express Order of the People, who had it in their Power to name whom they pleased for that Purpose.*—LEX, ne Consul de capite civis Romani injussu Populi quæreret, &c.

This

This was the first Step towards the Freedom of Trial in capital Cases; but what Amendments or Alterations it underwent afterwards till it became vested in the senatorial Order, History does not inform us. Indeed Dionysius Halicarn. tells us, that the *Judicia* were settled in the Patricians by Romulus *, but the Conduct of all the Kings after him shews, that either there were no *Judicia* or Trial by Jury, or else they were obliged to determine according to the Will of the Prince. If we may guess by the arbitrary Proceedings of Tarquin in this Case, as we have before seen out of Livy, we may presume the preceding Kings acted nearly in the same Manner; we have seen Romulus, ut libitum imperitaverat, was absolute and his Will the Law: And in this very Case of Judicature Dionys. Halicarn. says, *That the greater criminal Causes be reserved for his own Hearing, but the lesser be referred to the Senate* †. And the Occasion of Servius Tullius enacting Laws that even the Kings should be bound by—*quæis etiam reges obtemperarent*—seems to imply, that the Abuse also of their Power required some Redress, some Bounds to be set to their Despotism: So that as the Reign of the first and last King of Rome was arbitrary and their Government absolute, we may fairly conclude, that the intermediate Kings governed in the same Manner, and that there were no *Judicia* or Trials by Jury, not even of the Patricians, as Dionysius says, during the regal State of Rome, but that they were the Produce of better Times, and a Provision that grew out of Liberty and natural Justice.

This Power of determining in criminal Matters of the lesser Kind was at first lodged in the Senate for no other Reason, than as by

* *εὐπατριδᾶς ἱεραδαὶ καὶ ἀρχεῖν καὶ δικάζειν*. Dionys. Halicarn. in Romulo.

† *τῶν δὲ ἀδικημάτων τὰ μέγιστα μὲν αὐτὸν δικάζειν, τὰ δὲ ἐλαττονα τοῖς βουλευταῖς ἐπιτρέπειν*. Ibid. p. 84.

their

their Rank of Patricians they were supposed to be more capable of judging of right and wrong than the common, ignorant Multitude, who, as Dionysius observes, were excluded from the Management of public Affairs from their Want of Understanding and other Abilities necessary for the Discharge of that Trust; and in this Manner the Senate continued to be Masters of all judicial Process, and to have the Judges chose out of their Order only, for 300 Years. It is to be observed, that this Power of judging in criminal Matters was not particularly as such vested in the Patricians, but as they were appointed to be Assistants to the King in this infant State, all Matters relating to the Public that the King did not take Cognizance of, devolved upon them as the most capable to direct; among other Cares, this of Judicature was one, which, from being at first a Matter of Necessity, in Process of Time came to be claimed as a Right inherent in their Order, especially when they came to find themselves by Means of this Judicature Masters of the Lives and Properties of the rest of the People. However, we find them in Possession of this Power about U. C. 630. when making a very ill Use of that important Trust by Corruption and Oppression, the lower People thought it high Time to do themselves Justice, by first remonstrating against the Abuses committed in it, and then wresting that Power of doing Mischief out of the Hands of those who had so wantonly and corruptly used it against them.

Accordingly, the next Step they took was to demand some Patrons of their Order and Rights, who should be able to protect them against the Violence and corrupt Verdicts of the senatorial Jury. They then proceeded to require that the *Judices* or *Jury* should be chose out of another Order than the Senators, together with some other Regulations that were necessary to cover them from the Oppressions of the Great.

In

In this Situation of their Affairs, C. Gracchus passed a Law, called from him Lex Sempronia, whereby the *Judices* or *Jury* were to be chose out of the Order of Equites or Gentlemen, as the middle Rank between the Patricians and Plebeians.

We may make a Remark here, which will be useful to carry along with us whenever we consider the Transactions of that famous Period of the Alteration of this Part of the Roman Constitution by the Gracchi; There is nothing more common than the Cry against the Sedition of the Gracchi, their turbulent Temper and ambitious Proceedings, which we meet with in the Roman Writers *under the Empire*. This was no other than base Complaisance to Tyranny and Power, and a gross Insult upon the Liberty of the People, who were thus to be traduced as Rebels and Enemies to Society, for standing up in Defence of their just and natural Rights against the Corruption and arbitrary Proceedings of their Superiors. This was no other than vile Incense to despotic Government to arraign and abuse those who should presume to assert their Liberties against Corruption and Oppression. But what is called *Sedition* in the Gracchi, in Truth was nothing less.—It was an honest Attention to the Cries of an injured People for Protection against false Judgments and partial Decisions in case of Life and Limb.—Let us hear what Cicero says of them: *Non sum autem ego is Consul qui ut plerique, nefas esse arbitrer Gracchos laudare, quorum Consiliis, sapientia, legibus, multas esse video reipublicæ partes constitutas.* Cic. de leg. Agraria contra Rullum.—I am not, says he, either afraid or ashamed, as some may be, to praise the Gracchi, who by their Counsels, Wisdom and Laws restored the lost Parts of the ancient Constitution; and a little before he calls them *duos clarissimos, ingeniosissimos, amantissimos Plebis Romanæ Viros,*

Tib.

Tib. et C. Gracchos.—What was it they did? They made way for the tribunitial Power to operate on Corruption, and transferred the Choice of the Judices or Jury from the Senators, who had abused that Office, to the Equites or middle Order of Citizens, who were most likely to discharge it with Uprightness and Integrity*. This we may naturally suppose produced Disputes and Discontents between the two Orders which lasted long, till Servilius Cæpio settled the Matter by a Law, which appointed the Judices or Jury to be chose half out of the Senators and half out of the Equites. The next Alteration was made by a Law of Glaucia, whereby the whole Number was to be taken out of the Equites. By the Lex Livia it was again divided between the Senators and Equites, of each 300.—After all these Contentions between the Senators and middle Order, the Lex Plautia endeavoured to conciliate Matters, by adding the Plebeians or third Estate to the former two; so that 15 out of every Tribe were to be chose for this Service, and as the Tribes were 35, the 15 out of each amounted to 525 in the Whole.

Seven Years after, Sylla, who was displeased with the Equites and lower People for taking Part with Marius against him, being Dictator in Consequence of his Victory, passed a Law that the Judices should be chose out of the *Senate only*, who were *his* Friends. This was again changed by Aurelius Cotta about eleven Years after, by a Law that appointed them to be chose out of the three Orders, the Senators, Equites, and Tribuni Ærarii.

Let us stop a Moment, and hear the Complaint of Cicero relating to that Period, when Sylla by his absolute Authority chose the *Judices*

* Gracchi qui Plebis Rom. commodis plurimum cogitaverunt. Cic. de leg. Agraria c. Rullum.

or *Jury* from among the Senators only.—“ Under all the various
 “ Distresses, says he, that befell the People of Rome at the Time of
 “ the Dictatorship of Sylla, there was nothing they missed so much
 “ as the Dignity and Uprightness of the antient Jury. It was for this
 “ Reason they called aloud for the Tribunitial Power (that was now
 “ swallowed up in the Power of Sylla) to be restored to its original
 “ Vigour and Effect. By the Corruption of the Senatorial Jury,
 “ they were driven to insist upon a new Set of Men to execute that
 “ important Service. By the scandalous and base Prostitution of their
 “ Verdict, the People were tempted to wish for a Censor, which being
 “ looked upon *formerly* as a Name unpopular and odious, was *now*
 “ become the darling and favourite Topick in every Mouth. At a
 “ Time when the Wantonness of Power was exercised by the wickedest
 “ of Men, when the whole Roman People groaned under every Cause
 “ of Complaint, when the Dignity of the *Judices* or *Jury* was sunk
 “ into the lowest Infamy by Corruption, and the very Name of a Se-
 “ nator became offensive, under these deplorable Circumstances of
 “ my Country, I am not ashamed to own that I stepped forward in
 “ the Cause of the Public and its Laws, and endeavoured to redress
 “ these Grievances in some Measure by pointing to the Choice of able
 “ and honest Men to be employed in its Service *, as the one only

* *Populus Romanus* interea tamen multis incommodis difficultatibusque affectus est, tamen nihil æque in repub. atque illam veterem judiciorum vim gravitatemque requirit—Judiciorum desiderio tribunitia Potestas efflagitata est, judiciorum levitate ordo quoque alius ad res judicandas postulatur, judicum culpa atque dedecore etiam censorium nomen, quod asperius *antea* populo videri solebat, id *nunc* poscitur, id *jam* populare atque plausibile factum est—In hac libidine hominum nocentissimorum, in P. Romani quotidiana querimonia, judiciorum infamia, totius Ordinis Offensione, cum hoc unum his tot incommodis remedium esse arbitrarer ut *homines idonei atque integri* causam reipub. legumque susciperent, fateor me salutis omnium Causa, ad eam partem accessisse reipublicæ sublevandæ quæ maximè laboraret. Cic. prima Verrina sive Divinat.

“Remedy to be applied to these many Disorders.” So far the Text of Cicero. In the next Place, let us hear his Commentator Asconius Pædianus, who lived in the Time of Nero, upon the same Subject. In his Note upon the above cited Words of Cicero—*Ordo quoque alius ad res judicandas postulatur*—he says, that C. Gracchus passed a Law, that the Roman Knights should be the *Judices* or *Jury*, and they did their Duty honourably and uprightly twenty Years; then Sylla after his Victory made a Law for the *Judices* or *Jury* to be chose out of the Senators, and they discharged that Office corruptly ten Years; afterwards Aurelius Cotta appointed them to be chosen out of the three Orders of Senators, Equites and the *Tribuni Ærarii* *. It will be necessary to take Notice here who these *Tribuni Ærarii* were, and what was the Meaning of that Expression, which has been understood by some as if it had Relation to the *Ærarium* or Treasury, and that the *Ærarii* here signified the Treasurers of the Army.

The *Tribuni Ærarii* in this Place were the Representatives of the very lowest People, who were not included in any Tribe or Century, had no Vote, and not reckoned as Citizens in any other Respect than paying their Poll Tax, from whence they were called *Ærarii quia pro*

* Caius Gracchus legem tulit ut Equites Romani judicarent, judicaverunt per annos 20 *sine infamia*; post victor Sylla leges tulit ut Senatorius ordo judicaret, et judicavit per 10 annos *turpiter*, nunc Aurelius Cotta legem fert ut Senatores et Equites et *Tribuni Ærarii* *simul* judicent. Asconius Pædianus in *Divinatione* Ciceronis, p. 4. Edit. Aldi.—N. B. In another Place Asconius says, that the Regulation of Gracchus continued near 50 Years—annos prope 50 tanto enim fere tempore *Equester Ordo* judicavit lege *Sempronia*.—And this is confirmed by Cicero, *Verr. 2*.—Cum *Equester Ordo* judicaret annos prope quinquaginta continuos—ne tenuissima quædam suspicio acceptæ pecuniæ ob rem judicandam constituta sit.

capite tributū nomine Æra præberent *. This Rank of People was called *infra censum*; for the *Cense* or Qualification for a Senator was 800,000 H. S. 400,000 H. S. or Sesterces for a Knight. Hence Horace,

*Si quadringentis sex septem millia defunt,
Plebs eris—*

And all under this 400,000 Sesterces, or about 2500 *l.* Sterling for a Knight, or 5000 *l.* Sterling for a Senator, were reckoned among the Plebs or Commonalty. However, out of Men of this Estate was the third Part of the Judices taken by the Law of Cotta; because they had long experienced the Hardship and Oppression of being tried by the Nobles and Gentry, without having any of their own Rank, or, in our Language, *of their Peers*, to be on their Trial. To prevent therefore, as far as might be, any oppressive or corrupt Verdicts, and to give the lowest Subject a fair Trial where the third Part was to be taken out of themselves, the *Tribuni Æarii* were admitted by this Law to be a Part of the *Judices* with the Nobles and Gentry, that, in a free State as Rome was or ought to be, there should be no Rank of People whose Liberty or Life should be endangered by Corruption, or liable to suffer by Injustice and Oppression. Of so ancient Institution is the *Trial by Peers* among the Romans, and much antienter yet, as we have seen, among the Greeks, which indeed did not then commence to be a Law when it was written, but, as Cicero says, upon another Occasion, *hæc non scripta sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura arripuimus, hausimus, expressimus, ad quam non docti sed facti, non instituti, sed imbuti sumus.* Cic. pro Milone. Which applied to our present Subject shews us, that the Trial by Jury

* Plebeius in centum tab. referretur et Æarius fieret ac per hoc non fieret in albo Centuriæ suæ, sed ad hoc non esset Civis tantummodo ut pro capite suo Tributū nomine Æra præberet. Ascon. Pædian. in Divinat. Ciceronis.

of our own Equals seems to grow out of the Idea of just Government, and is founded in the Nature of Things.

It will be needless to give an Account of all the Changes that happened in the Choice of *Judices* out of the different Orders (from the Time that it was first transferred from the Senate to the Equites by C. Gracchus) according as each Magistrate, who proposed the Law, was attached to either Party, one of which aimed at Power, the other at Liberty. It will be sufficient to say, that Pompey, who favoured the People, continued this Law of Cotta, and Cæsar, who was no Friend to them, struck off the Tribuni *Ærarii* or the popular Part of the *Judices*, and Antony in their Stead added the Officers of the *Legio Alauda*; and his Reason for this extraordinary Measure was, *aliter nostri negant se salvos esse*, that otherwise his Party were not in Safety.—This Reason of Antony carried such evident Marks of Corruption with it, that Cicero could not help crying out, O Contumeliosum honorem iis quos ad judicandum nec opinantes vocatis—Hic enim est Legis index, ut ii in tertia decuria judicent, qui libere judicare non audeant*. How reproachful must that Kind of Honour be that calls Men upon the Jury that never desired it; this plainly shews the Intent of Antony's Law, which was to secure the Voices of such Men as were not at Liberty to act in this Case uprightly. The *tertia decuria* in this Passage, and the *duæ decuriæ* Senatorum et Equitum in the Law of Antony, signify the Lists or Panels of the several Orders out of which the *Judices* were chose; for *decuriare* was no more than *describere*; and in this first Philippic of Cicero we find *decuriatio tribulium* and *descriptio populi* put together, which was the same as Glanvil calls in our Law, *nomina eorum imbreviare*, or

* Cicero. prim. Philipp.

entering their Names on a Roll—called also impanelling a Jury.—
Glanvil de Leg. et Consuetudin. Angliæ, lib. ii. c. 7.

From this View of the several Steps taken by the great Men of Rome to support their Power, by being Masters of the *Judices* or *Jury*, and by the lower People and their Friends to defend their Liberty against the Encroachments and Corruption of the Senators *, we may observe, that the interior Troubles in the Roman State from the Time of C. Gracchus to the Death of Cæsar, were chiefly Contentions about who should be Masters of the *Jury*, and out of what Orders they should be chose.—And altho' this seems at first Sight to be a Matter too inconsiderable to raise such a Flame, yet it will appear to be of the utmost Importance, when we reflect what Influence it would give an Aristocracy to chuse the *Judices* or *Jury* out of themselves and Friends, that upon all Occasions would favour their Pretensions, seeing the Lives and Fortunes of their Opponents by these Means would be in their Power †; and on the other hand, of what Concern it was to the People in general to have *able* and *bonest Men* of their own Rank as Part of the *Jury*, upon whose Integrity they might depend for Justice and Protection. This plainly appears from the Corruptions of the *Judices* when chose out of the Senators, the Violence and arbitrary Conduct of the Dictators Sylla and Cæsar, the Struggles that were perpetually made by the People and their Patrons against the Tyranny and Oppression of a Senatorial *Jury*, and the constant Change they made in favour of Justice and Liberty whenever they found themselves in a Condition to do it, till at last it became entirely lost under the absolute Government of the Emperors.

* Misera est ignominia Judiciorum publicorum. Pro C. Rabirio.

† Omnes omnium pecuniæ positæ sunt in eorum potestate qui *judicia dant*, et eorum qui *judicant*. Cic. 2. Verrin.

It is to be confessed, that the Argument used in favour of that Trust being reposed in the Senate, as Men of Dignity, Rank and Property, had its Weight in the Sense it was urged by Cicero against the Appointment of the military Officers by Antony---In *Judice spectari fortuna debet et Dignitas*, Philipp. 1.—That Fortune and Dignity ought to be considered as Qualifications for a *Judex* or *Juryman*. But when these Qualifications, respectable as they may be, instead of being a Security to the Public, were made use of as Means to enslave and injure it, it became the Duty of every Man to endeavour to procure such an Alteration as was consistent with Publick Good: for great and distinguished Talents, and Qualifications of Fortune and Power, with a bad Heart to direct the Operation of them, is such a Curse, as we could not wish a worse to our greatest Enemies.

This was the Case of the Senatorial Jury before Gracchus, this was the Case of that under the Dictatorship of Sylla, of which Asconius says before, *judicavit per decem annos turpiter*. This was the Case when Julius Cæsar struck out the *Tribuni Aerarii*, because they supported the Cause of Pompey and Liberty against Tyranny and Cæsar. For which Reason, it was very just and laudable to endeavour to exclude the Senate from being the sole Judges or Jury, and vest it equally in the People, who were more likely, and indeed actually did discharge that important Trust with more Integrity—*Judicarunt (Equites) per 50 annos sine infamia*. Ascon. Pædian. *supra*.

What a miserable State the Affairs of Rome were in from the Corruption of the Senatorial Jury under Sylla, we may learn from the two first Actions against Verres by Cicero. I shall transcribe two or three Passages out of them, which will be sufficient to shew what shocking Use was made

made of a *bribed Jury* by Tyranny and Power.—At the Opening of the first Action, he says *, addressing himself to the Jury, *That it was the prevailing Opinion, both at home and abroad, that a rich Man tho' never so guilty, would never be cast by the Jury as it stood then (in the Time of Sylla) but that by the Trial of Verres, who was so execrable and infamous a Man in himself, and already condemned in the Opinion of all sober Men, they had a happy Opportunity offered them to retrieve their lost Honour and Reputation (existimationem Judiciorum amis- sam) by finding him guilty; that he took upon him to say so much, not to cast any Reflections on the Senatorial Jury, but to put them in Mind to wipe away the Infamy that stuck to them, by doing now an exemplary Act of Justice.* He says in another Place, *That the Verdicts given for the last ten Years (that is, since the Jury were chose out of the Senators) were nefarious and flagitious †.* He speaks likewise of a Trial, *where a Senator being on the Jury, took Money from the Accuser to condemn the Criminal, and from the Criminal to acquit him, which he was to divide among the Jury ‡.* He then tells a Story, that Verres should

* *Inveteravit jam opinio perniciofa reipub. vobisque periculosa, quæ non modo Romæ, sed et apud cæteras nationes, omnium sermone percrebuit, his judiciis quæ nunc sunt pecuniosum hominem, quamvis sit nocens, neminem posse damnari—Nunc in ipso discrimine ordinis, judiciorumque vestrorum. . . . C. Verres homo vita, factis, omnium jam opinione, damnatus, pecuniæ magnitudine, sua, spe, ac prædicatione absolutus—Huic ego causæ. . . . Actor accessi non ut augerem invidiam ordinis, sed ut infamiæ communi succurrerem, &c. Cic. Verrini 1.*

† *Quæ intra decem annos postea quam judicia ad Senatum translata sunt, in rebus judicandis nefariæ, flagitiosæque facta sunt.*

‡ *Inventus est Senator, qui cum judex esset in eodem judicio, et ab reo pecuniam acciperet, quam judicibus divideret, et ab accusatore ut reum damnaret. Verrin. 2.—And Pro Cluentio he calls a corrupt Jury, nummatil Judges.—And Epist. ad Attic. lib. iv. Ep. 16. he speaks of Judicum Sordes.*

say that he had the Protection of a great Man, for the plundering of Sicily, that he did not do it for himself, for out of his three Years Profit, one Share only was to go to himself, the second to his Lawyers and Patrons, and the third to the Jury to acquit him: Upon which he observes, that their Colonies would be induced to wish there was no Law *de repetundis pecuniis*, or against Extortion, for then their Governor would plunder only enough for himself and Family; whereas, now they are obliged to provide for their Patrons, Advocates, Prætors and Jury*. He at last concludes, nulla in Judiciis severitas, nulla religio, nulla denique jam existimantur esse Judicia †,—*That there was not any Justice or Religion in their Verdicts, which were not any longer regarded.* Let us place what he says of the Integrity of the Equestrian Jury by the Side of this.—Cum equestor ordo judicaret, annos propé 50 continuos, ne tenuissima quidem suspicio acceptæ pecuniæ ob rem judicandum constituta est—During the Time that the Judges or Jury were chose out of the Equestrian Order, there was not even the least Suspicion that they took Money for their Voices, or were corrupted in their Verdict: Whereas, when the Jury was composed of Senators it could be said of them, eos qui Dominos Judiciorum se dici volebant, harum cupiditatum esse servos,—*That they who desired to be thought Masters of the Jury, were themselves Slaves to Avarice and Corruption.* Verrin. 1. Judiciorum Dominos—the very Expression used by Æschines when he calls them τῆς ψήφου κυριεύς Æsch. παραπρεσβείας, p. 304. This corrupt and oppressive State of Things after the Victory of Sylla, is frequently inveighed against by Cicero in his Orations against Verres, which may be consulted by the Reader; I shall only add, what he says upon the same Occasion pro C. Rabirio

* Se habere hominem potentem cujus fiducia Provinciam spoliaret, neque sibi soli pecuniam quærere, sed ita, &c. Verr. 1.

† Ibid.

—*Misera est ignominia judiciorum publicorum*—The Ignominy that attends the public Jury is truly to be lamented.—We have thus far seen what the *Judicia* were, and out of what Orders they from Time to Time were chosen; from whence there is no Doubt to be made, but they were in all Respects, with regard to the Principles of the Institution and Operation, the same with our *Jury*.

But this will appear more evidently, when we consider some other Circumstances attending the *Judicia* or Trials among the Romans.

The Number of the Jury, *i. e.* those out of whom the *acting Jury* for the Year to come was to be chose, was various at different Times. These were drawn by Lot by the Prætor, who was sworn to use no Partiality*, and out of these the Jury upon every Cause was taken. The first Choice was made out of the Citizens of best Note on the Kalends of January†, which was the Day that all the public Officers were chose for the Year, and those out of whom the Jury was to be chose by Ballot; and out of these thus chosen at the Beginning of the Year were all the other Juries or Judges supplied upon every new Cause, to the Number of 81, of which we shall see more in what follows: These were called Judges, and *Jurati homines*‡, in the same Sense as among the Greeks *οικουμενορες*, *Jurats* or *Jurors*, or, as we say, *Jury* or *Jurats*.

* *Prætores urbani, qui jurati debent optimum quemque in selectos judicas referre, &c. Cic. pro Cluentio.*

† *Nunc Judicem ex Kal. Jan. non habebimus. Cic. in Verr.*

Ex quo me Pop. Romanus ex Kalendis Januarii secum agere de republica, ac de hominibus improbis voluit. Ibid. Verr. 1.

‡ *Discoloribus signis Juratorum hominum, &c. Verr. 2.*

Let us now take a View of the Method of proceeding in Causes where the Judices or Juries were concerned, in order to know with some Exactness what the Duty of the *Judices* was; and herein we shall follow the Account given of this Matter by Asconius Pædianus the Commentator on some Parts of the Works of Cicero, whom, as he lived in the Time of Nero, and so near the Age of his Author, we may suppose to be fully informed of the Customs and Forms he speaks of, and which perhaps were in Use in his own Time. In the Argument to the Oration of Milo, it is said, *That Domitius the Judex-Questionis declared the Opinion of the Jury, sententiam judicum, that Milo's Slaves should be examined; after that, the Witnesses were called according to the Law, which appoints the Witnesses to be examined three Days before the Cause comes on, and that the Judices should approve of their Testimony: On the fourth Day all Persons concerned were ordered to attend the next Day, and the Judices or Jury were produced to the Accuser and the Accused, as prepared for the Choice by Ballot. The next Day they ballotted 81 Persons to make up the Jury, which when done, they took their Seats. Then the Counsel for the Accuser was allowed two Hours to make good his Charge, and the Accused three to make his Defence, and the Jury to bring in their Verdict that same Day. But before the Verdict was brought in, sententiæ ferrentur, the Accuser had the Liberty to challenge five out of each Order, the Prisoner the same; so that the Number that remained to give the Verdict was 51*.*

And

* Domitius ex sententia Judicum pronunciavit ut ex servorum eorum numero, accusator quot vellet ederet; citati deinde testes secundum legem quæ jubebat ut priusquam causa ageretur, testes per triduum audirentur, dicta eorum judices confirmarent; quarta die adesse omnes in diem posterum juberentur, ac coram accusatore et reo, *Pilæ* in quibus nomina judicum inscripta essent, æquarentur. Dein rursus postera die sortitio judicum fieret unius et 80, qui numerus cum sorte attigisset, ipse protinus sessum irent;

And what is here cited out of the Argument, is also confirmed out of the Comment of Asconius on the Oration for Milo. *The Cause*, says he, *being thus argued on both Sides, the Accuser and Prisoner each challenged five out of each Order of the Senators, Knights and Trib. Ærarii, or lower People; so that 51 gave their Verdict* *. Accordingly the Numbers mentioned by Asconius upon the Condemnation of Milo shew that the Judices or Jury were *exactly* 51. He was

Condemned by		Acquitted by	
Senators	12	Senators	6
Equites	13	Equites	4
Trib. Ærarii	13	Trib. Ærarii	3
	38		13

Condemned 38

Acquitted 13

51

Challenged by each 15 — 30 makes the

81

Which was the Number returned on every Jury before the Challenge, or *rejection Judicum*, which Cicero speaks so much of in the Orations

irent; tum ad dicendum accusator duas horas, reus tres haberet; reusque eodem die illo judicaretur. Prius autem quam sententiæ ferrentur, quinos ex singulis ordinibus accusator, totidem reus ejiceret ita ut numerus Judicum relinqueretur qui sententiam ferrent quinquagesimus et unus. Argumentum in Ascon. Pædian. Comment. in Orat. pro Milone.

* *Peracta utrinque Causa, singuli quinos accusator ut reus Senatores, totidem equites et tribunos Ærarios rejicerunt ita ut unus et quinquaginta sententias tulerint. Asconius Pædianus in Orat. pro Milone ad finem.*

against Verres *. In like Manner M. Saufeius was tried as an Accomplice, and acquitted by one Vote †; but there is a Mistake of one in the Numbers, which ought to be added to the Acquitters, otherwise they are even.—

Condemned by		Absolved by	
Senators	10	Senators	7
Equites	9	Equites	8
Trib. Ærarii	6	Trib. Ærarii	10

A like Mistake in setting down the Numbers is to be corrected in lib. iv. Epist. ad Attic. 15 and 16. Ep. In the first, Procilius is said to be condemned by 28, absolved by 22, which makes 50; whereas the Number of the Jury, as we have seen above out of Pædianus, ought to be 51; so that instead of 28 it ought to be 29, which added to the 22 who absolved him, makes the true Number 51. So also Ep. 16. Lentulus was condemned by 32, acquitted by 38; in which there is a manifest Mistake, as the Whole could be but 51.

Upon the Whole we may observe, 1st, That Domitius the Quæstor ex Sententia Judicum pronunciavit; from whence we may draw this plain Conclusion, that the Magistrate Domitius, who presided in the Cause of Milo, and pronunciavit Sententias Judicum, *delivered the Opinion or Verdict of the Judges or Jury*, was of a different Office

* That these Tribuni Ærarii were not Quæstors or Treasurers of the Army, as some think, may appear from hence; that these that composed the Jury were at least 200 in all, and on every Jury a third Part of 81, *i. e.* 27; whereas the Tribuni or Quæstors of the Army were fewer in Number, and obliged to be with the Troops abroad; so that they could not possibly attend any Civil Affairs at Home.

† Obtinuerunt ut una Sententia absolveretur. Ascon. Pæd. in Orat. pro Milone.

from

from the Judices; in the next Place, that the Judices at the first Ballot were 81, but by Challenge were reduced to 51, who gave their Voices and often determined the Question by one Vote, the odd one being added among the Romans for the same Reason as among the Greeks, lest by an Equality of Voices a Criminal might be acquitted. Whoever therefore had the *odd one*, if it came so near, carried the Point. See above in the Greek Jury. After this View of the Office of the Magistrate, the Number of the Judices, the Challenge, or Rejection by both the Accuser and Criminal, and the remaining 51 trying the Cause and bringing in the Verdict, which was reported by the presiding Magistrate, what can any intelligent Man conclude, but that the Judices were not Magistrates or Presidents of Courts, but an Institution in almost all essential Points corresponding with an English Jury.

After the Counsel had been heard their legal Time, which was appointed by the Lex Pompeia, and which Cicero alludes to when he says, Verr. 2. Si utar ad dicendum meo *legitimo tempore* *, the Judices gave their Verdict to the Quæstor; Who this was is not agreed upon by Commentators, but we may well understand his Office and Jurisdiction from what Asconius, who lived in the Time of Nero, tells us, perhaps from his own Knowledge.---He says, *That the Quæstor was the Prætor who presided in Causes criminal* †. Now the Prætor or chief Magistrate of Rome had such a Multiplicity of Business to attend to, that it was next to impossible for him to preside at every

* Credo si meis horis in accusando uti voluissem, &c. Cic. Verr. 2.

† Quæstor, prætor de pecuniis repetundis quæstionem exercens, nam propriè *Quæstiores* dicuntur criminalium Quæstionum. Ascon. Pædian. Verr. 2.—Judex nequam et levis, quod prætor jussit judicet. In Verr. lib. ii.

criminal Process, and therefore when he could not be present himself, the People * chose a Deputy, a Quæstor, to act in his Place for that Time; he was also called *Judex Quæstionis*. And by Asconius in Verr. 3. speaking of one Junius, who was condemned by the Intrigues of Verres for declaring his Mind too freely of a Jury that was corrupted, at the same Time that he was Quæstor, he is called *Princeps illorum Judicum* †. The Form of appointing him, and the Jurisdiction annexed to the Office was, *Judex esto, et si parcat rem ita esse, pronuncia* ‡. Hence it appears, that the chief Office of the Quæstor was *pronunciare*, to declare the Verdict given by the Judges or Jury, which was called, *Sententiam ferre*. Cicero to Herennius observes, that one Part of his Office likewise was to keep the Accuser, Criminal and Witnesses to their Duty; by which was meant no more, than that he was to see a proper Decorum preserved in the Court §. Upon the whole, the Prætor when he presided himself || was the Quæstor or *Judex Quæstionis*, i. e. the Judge in the Cause; but when he was otherwise employed, which often happened, the Person chose to supply his Place was called the *Quæstor*. It is to be observed here, that by the Law *de Provocatione* the People appointed a Person to preside on the Trial in a capital Case, who was thence

* Ut quæstor *suffragio populi*, ex iis qui Consules fuerant crearetur. Ascon. Pædian. pro Milon. in argum.

† Jubet lex ea, qua lege hæc quæstio constituta est *judicem quæstionis*, &c. quærere de veneno. Cic. pro Cluentio.

‡ Vide Sigonius de Judiciis, lib. i. cap. 24. et lib. ii. cap. 6. Briffonius de formulis, lib. v.

§ Quæstoris Officium unumquemque eorum sc. Accusatoris, Defensoris, et testis, in Officio continere. Cic. ad Herenn. lib. iv.

|| Unum id intelligo, quod Prætor Romanus in refectione judicum judicavit. Verin. 1.—And again, Prætor urbano sortiente. Ibid.

called

called *Quæstor* or *Quæstor Parricidii*. Hence Pomponius D. de Origine Juris says, upon this Law---*Quoniam de capite Civis Romani injussu Populi Romani, non erat permiffum lege Consulibus jus dicere; propterea quæstores constituebantur a populo, qui capitalibus præffent, et appellabantur Quæstores Parricidii, quorum meminit Lex 12 Tabularum.* And Festus to the same Purpose---*Quæstores Parricidii appellantur quos solebant creare causa rerum Capitalium.*---This Custom of the People choosing a Judge in capital Cases, began after the Expulsion of the Kings, and the Establishment of Liberty under a Commonwealth, and continued to U. C. 604. when under the Consulship of Manilius and Censorinus, L. Calpurnius Piso, Tribune of the People, passed a Law against Corruption, and at the same Time made the Office of a Judge in this Case a permanent Magistracy, which before was only an occasional Appointment. Cicero in Bruto says---*Carbone forum tenente quæstiones perpetuæ constitutæ sunt.*---So that we learn hence, that the Judge upon capital Causes was chosen by the People, from 340 to 604 or thereabouts, and was not a fixed Office; but from 604 by the Law of Piso it was settled for a Time in one Person. From 340 therefore to 604 the Judge in capital Cases was called *Quæstor Parricidii* when he was chose by the People on every Trial; but when this Office came to be fixed in the Prætor for the Time being, or in his Absence in a Deputy, he had the Name of *Quæstor* or *Judex Quæstionis*. From hence it appears, that these were not Names of different Offices, but of the same Office at different Times; which Remark will be useful to be attended to in reading the Roman Historians or Orators.

After the Counsel for each Party had finished by saying *Dixi*, the Prætor or Quæstor sent out the Jury or Judices to consult about their Verdict, *misit in Consilium*, i. e. says Alconius in Verrin. 3. *Judices mittere in consilium est, dimittere Judices ad sententiam dicendam*; they then rose

and went to Consultation, *consurgitur in Consilium*. It is to be observed, that *consurgitur* has a Reference to the *Sitting of the Jury*, who in like Manner were called from this Circumstance καθίστοντες and οἱ καθήμενοι among the Greeks, and by Cicero *in reum confedere*, to sit upon the Prisoner. Verr. 1. Therefore when they had heard the Evidence, *consurgitur in Consilium*, they got up to go to Consultation; so that the *Confedere* and the *Consurgere* had Relation to the Action of the Judices in the several Parts of the Trial. See farther what is said on the Greek Jury, p. 44. *Itum est in Consilium*, Cic. pro Cluentio.—When they returned with their *Verdict*, *cum sententiæ ferrentur*, and delivered it to the Prætor, or whoever else was the presiding Magistrate, he pronounced it, *Patravisse videri pronunciat Magistratus cum de Consilii Sententia aliquem capitis condemnatus est*. Cic. in Lucullo seu 4. Academic. Quæst. et de fin. boni et mali *. The Part that the Magistrate bore at a Trial was only *pronunciare*, to declare the *sententia judicum*, or *Verdict of the Jury*; from whence we see that the *Judices* were not in any Kind of Magistracy, and their Offices totally distinct.—We may hence likewise observe, that these Judices were Judges of *Law* as well as *Fact*; which Cic. pro Milone plainly shews, when he says, *Facti in eculeo est quæstio, Juris in Judicio*, the *Matter of Fact* is to be enquired of by Torture, but the *Matter of Law* by the Jury. That the *Judices* were not *Magistrates* or *Presidents of Courts*, as our Judges, which is the general Acceptation of the Word by Commentators, most evidently appears from Cic. pro Cluentio, where, speaking of the salutary Operation of Laws for the Support of Civil Society, he says, *Legum ministri magistratus, legum interpretes Judices*—That the *Magistrates* were the *Executors of the Laws*, but the *Judices* or *Jury* were

* L. Torquatus—se ex utraque parte audita pronunciaret, &c. Cic. de fin.

the Interpreters of them—than which nothing can be more exprefs to fhew that the *Judices* we every where meet in the Roman Orators and Historians, were not Magiftrates, but another Order of Men appointed and chofen from among all the Ranks of Citizens, to try, like our Jury, all criminal Cafes. In this Senfe they were *interpretes legum*, Persons fworn to compare the Crimes committed in the State with the Laws, and to fhew how far they were or were not within the Defcription of them. Upon which Sigonius de Judiciis, lib. i. cap. 24. fays exprefly—*Judex cognovit omnes caufas et Juris et Fa&ti*—That the Jury among the Romans were *Judges of Law as well as Fa&ct*.—And indeed this feems to have been the antient Opinion of able Lawyers, and even of the Law itfelf, with regard to the Power and Rights of an Englifh Jury. 13 Ed. I. c. 30. it is faid, *If the Jury of their own Head will fay it is Diffeifin, their Verdict fhall be admitted at their own Peril*; and Herle, chief Juftice, to Henry III. faid to the Jury: *Good Men, if you find that A. was not feifed in the Time of King Henry, you fhall enquire no more; but if you find he was feifed, then enquire farther of the Writ, i. e. of the Right**.

Nothing can be more declarative that the Jury are Judges of Right and Law, than this Authority and Direction of the Statute and the Judge who is fupposed to be the Oracle of the Law. And the Author of the Trial per pais, or Law of Juries, tho' he inclines fometimes to the Opinion of their being confined to Matters of Fa&ct only, as in p. 220. of the Edition in black Le ter, yet a little after he fays, p. 251. *a fpecial Verdict is a plain Prof that the Jury are Judges of Law as well as Fa&cts; for leaving the Judgment of the Law to the Court implies, that if they pleased they had that Power of Judgment in themfelves.*

* Littleton's Tenures, cap. Releases ad fin. See alfo Coke's Note upon it.

Again, p. 336. he says, *When the Question is asked the Jury, Guilty or not Guilty, which includes the Law, in their Answer they resolve both Law and Fact.* And beyond all Doubt this reasoning is right and just; for how can a Jury declare *Guilty* or *not Guilty* unless they compare the Fact with the Law, and thereby judge how far the Fact comes within the Penalty annexed to the Breach of the Law; and how can they compare without being Judges of one as well as the other? But notwithstanding this Doctrine of not being Judges of Law, broached in bad Times, and designed for the worst Purposes, long prevailed in Westminster-Hall upon the Authority of Chief Justice Coke, yet a great and learned Judge, as I am informed, has lately declared, to his great Honour, from the Bench, that the Jury were Judges of *Law* as well as *Fact*.

Besides the Duty of the *Quæstor* above mentioned out of Cicero to pronounce the Verdict and keep up the Decorum of the Court, it was likewise his Business to inspect the Ballot in the Choice of a Jury upon every Trial, first of the 81, and the Challenge of 15 each by the Accuser and Prisoner, which reduced the Judges upon the Verdict to 51, as has been seen before. This Challenge of 15 each was called *relectio Judicum* or the *rejecting of the Jurymen*; the Design of which was, that the Trial should be conducted with all possible Uprightness and Fidelity; so that no one within the Number 15 on each Side, should be retained that either Party had lawful Objection to. This equitable Provision is likewise made by the English Law, Ordinat. for Inquests, 33 Ed. I. Stat. 4. 25 Ed. III. Stat. 5. cap. 3. and 35 Hen. VIII. cap. 6. sect. 7. by way of Affirmance and Application of the Common Law to the several Cases therein mentioned; for the Use of Juries, as all other Parts of the Common Law, I apprehend arose originally from the Practice in the feudal Courts, where the Homagers were the

Parcs.

Pares tenuræ, and tried every Cause between the Lord and them, or between each other as Parties, where they had the natural Right of excepting against any being on the Trial whom they had lawful and just Objection to. This Right the Lord had also when he impleaded any of the Homagers, of which Exceptions the Court was Judge.— So by the above cited Act 33 Ed. I. Stat. 4. it is provided, *That they who sue for the King, if they will challenge any of the Jurors, they shall assign a Cause, and the Truth of the Challenge shall be inquired of.* This Trial by Jury was a Part of the feudal Law, as we learn from the Laws of the Confessor, which were restored and established by the Conqueror in the fourth Year of his Reign. In the 27th Law it is said, *Si home volt derainer covenant de terre vers soun Seignor par ses pers de la tenure meimes, &c.*—If a Man will try a Cause of Covenant about his Land with his Lord, by *his Peers of the Tenure, &c. i. e.* by the Homagers of the Lordship. From whence it appears, that the Trial by Jury was Part of the feudal Law in the Court Baron, which not being written, but transmitted by Custom from one Generation to another, became by *Length of Time the Law of the Land*, or what is called the *Common Law*. And where a Variety of Circumstances in Process of Time made an Alteration in the Form of the Tenure and the Consequences arising from it, it became necessary to make new Laws for new Occasions, which is what we call the *Statute Law*. Wherever therefore the *Statute Law* treats of Juries, it is not to be understood as if the Institution of Juries took its Origin and Rise from thence, but only that particular Alterations and Additions were made by Statute to the ancient Form of Juries by the *Common Law* or *Feudal Custom*. When therefore we read of the *rejectio Judicum* in Trials by Judges among the Romans, and compare it with the *Challenge of Jurors* in judicial Process among ourselves, What can any Man of a

tolerable Degree of Understanding conclude, but that the Trials where these Forms were used both among the Romans and English were founded on the self-same Principles, and the *Judicia* among the former were exactly and in effect the same with the Jury of the latter. This rejecting the challenged Jury was a high Trust reposed in the *Quæstor* or Judge upon the Trial, but liable often to be abused, and actually was when the *Quæstor* was within Reach of a Bribe. Accordingly Cicero against Verres says, that he knew some People that in his Memory in conducting the Challenge had not escaped the Suspicion of a corrupt Bargain—*Sciebam in rejiciendis Judicibus, nonnullos memoria nostra pactionis suspicionem non vitasse.* Verr. 2. It is well worth our remarking upon the present Subject, that the very Word *Pactio*, which the Romans made use of to signify *Corruption and Bribery* in constituting their Judges or Juries, has been aptly enough retained in the same Acceptation among us, when, in the same Case, we say a *Pact Jury*, or *Jury per Pactionem*. There is another Passage of Cicero against Verres where this Word *Pactum* is cited in the Sense of corrupting the Jury by making a Bargain with them to acquit him.—When Verres, says Cicero, returned from his Province, he made an Agreement with some Jobbers to give a very large Sum of Money for a Jury to acquit him when he should be brought to Trial, and stood to his Contract (*mansit in Conditione atque Pacto*) till we came to the Challenge; but when that was made, and the Number excepted to were struck off, and the good Fortune of the Roman People prevailed over his Money, and my Diligence in the Challenge prevented their Impudence and Corruption, when he saw this, he refused to stand to his

Bargain*. This *Pactio* among the Romans, was what was called by the Greeks *παρασκευη* in this same Sense of *managing* and corrupting of the *δικασται*, which were the same as the Roman *Judices*, who were an exact Copy of the Greek *δικασται* and imitated from the Institution of Solon. There is a remarkable Passage to this Purpose in Æschines c. Ctesiphon.—It is to be confessed, says he, that formerly Things were conducted and carried on well, but *now* some particular Persons take upon them to make what Laws they please, others give their Verdicts as Jurymen, without being chose in the legal Manner, but sitting by Management and Collusion, *ἐκ παρασκευης καθεζομενοι*. It is this *corrupt packing of a Jury* that is meant, as is before mentioned, by the *δικαστηριον παρασκευασθαι* in the Case of Cleophon; so that what the Greeks called *παρασκευη* or *preparing a Jury*, the Latins called *Pactio*, and from them we take the Expression a *Pact Jury*.—The *παρασκευη* or *præparatio*, I think is aptly enough rendered in our Laws by the evil *procuring of Dozens*, or Jury of twelve Men. See before, p. 34. From all which it appears, that *παρασκευη* and *Pactio* related among the Greeks and Romans to what we call a *Pact Jury*; and the *δικασται* of the former and *Judices* of the latter, to whom these Expressions were applied, were of the same Institution and Use as an English Jury. It is likewise to be observed, that from this *Pactio* and *Pactum* being taken in a *bad Sense*, so as to signify *Bribery* and *all Kinds of Corruption*, the Roman Lawyers made use of the Word *Depectus*, as appears from Ulpian D. de Calumniatoribus—*Depectus dici-*

* Ut primum a provincia rediit, redemptio est hujus Judicii facta grandi pecunia, mansit in conditione atque pacto usque ad eum finem, dum judices rejecti sunt, postquam rejectio judicum facta est, quod et in sortitione, istius spem fortuna populi Romani, et in rejiciendis judicibus mea diligentia, eorum impudentiam vicerat; renunciata est tota Condicio. Cic. Verr. 1.

tur turpiter Pactus.—From this Part of the Office of the Quæstor in giving the *Ballot*, he is said *Judicia dare*, as is before observed out of Cicero, Verr. 2. and those who were chose upon the Jury were said *judicare*; so that here is a manifest Difference between the Magistrate who gave the *Ballot*, and the *Judex* or Juryman that was chose by it.—It is to be observed, the Phrase of *Judicia dare* is expressly taken from the Greek Expression, *την ψηφον δίδοντες*, used in this Sense by Lysias *. This giving of the *Ballot* by the Quæstor is alluded to by Virgil when he describes Minos, the fabulous Judge of the Dead, determining the Fate of each—

Nec vero hæc sine sorte datæ, sine judice, sedes

Quæstor Minos urnam movet—

Virg. Æn. 6.

After the Challenge or *rejectio judicum*, when 51 remained to give their Verdict, they were sworn *Sententiam ferre* justly and impartially. Hence Cicero, Verr. 1. calls it *Sententiæ juratorum hominum*—Upon which Words Asconius comments thus: *Juratorum hominum scil. Judicum, qui in leges antequam judicarent jurare consueverant.* Hence we see, that the same Body of Men that the Romans called *Jurati homines*, we in our Laws call *Jurats* and *Jury*, for the very same Reason, and the Greeks *ομωμοκοτες*.

What the precise Form of the Oath was I cannot find: But Asconius in Verr. 1. says, *his perfectis jurabant in leges judices ut obstricti religione judicarent; cum jurassent omnes præter ipsum prætorem, nomina eorum libellis continebantur, et ubique habebantur ne pro selectis judicibus, ut sit in multitudine, aliqui suppositi corruptissimi judicarent.*

* — οἱ θεσμοθεταί. τιθέντες τὸν ἀγῶνα καὶ τὴν ψηφὸν δίδοντες. Lysias. c. Alcibiad. 2. ad init.

—That the Jury swore that they would religiously give their Verdict with Truth and Uprightness; and when they had all (except the Prætor) taken the Oath, their Names were entered in a List, which was banded about, lest in such a Number and the Hurry of Business some false Persons might slip in by Corruption to give their Voices. Can these Words be applied to any Body of Men so aptly as to a Jury? Altho' we have not the Oath entire from the Roman Orators and Lawyers, yet we may pick up here and there the main Purport of it. We have seen above out of Asconius Pædianus, that the Judices or Jury were in general to give their Verdict, *Sententiam ferre*, according to Law. From Seneca Controvers. lib. ii. we learn, that they swore *se nihil gratiæ, nihil precibus dare*—That they gave their Voice without Favour or Affection. From Cicero Academic. Quæst. lib. iv. that they swore to give their Opinion to the best of their Knowledge, *ex sui animi Sententia*. Let us here cast our Eye on the Oath of an English Jury as formerly it was observed—Articul. et Sacrament. Ministri Regis in itinere incerti temporis, sect. 1. out of Rastal's Abridgement:

‘ This Oath shall be made by the twelve Knights when they be chosen by two.—“ This hear, ye Justices, that I shall lawfully say
“ and lawfully do, that which shall be demanded of me on the
“ King's Behalf, and shall keep secret your Counsels, and shall not
“ for any Thing leave to do that which to my Knowledge I ought to
“ do. So God help me and his Saints.”——Observe, *I shall not for any Thing leave to do that which to my Knowledge I ought to do*; which is directly of the same Purport with that Part of the Oath of the Roman Judices, *se ex sui animi Sententia facere*, and *nihil gratiæ, nihil precibus dare*. Compare also the Oath of the Heliastæ or Jury among the Greeks, p. 39. above; and we shall find the Oath of the

Heliastæ among the Greeks, of the *Judices* of the Romans, and the *Jury* of our own Country throw such Light upon each other, as evidently to shew they were in Principle and Intention one and the same Institution. The Circumstance of twelve Knights chosen by two related to the Custom in Henry the Second's Time of appointing two or four Knights to choose a Grand Jury of twelve, each of which was to be a Knight, *i. e.* a Person of Credit and Property: The Form of the Writ to the Sheriff for that Purpose we see in Glanville, lib. ii. c. 11. Rex vicecomiti salutem—Summone quatuor legales milites de visineto de A. quod sint ad clausum Paschæ coram me vel justiciis meis apud Westmonasterium ad eligendum super sacramentum suum 12 legales milites de eodem visineto, qui melius veritatem sciant, ad recognoscendum super sacramentum suum, utrum M. vel R. majus jus habeat in una hida, &c.

The Manner of giving their Verdict was thus: The Prætor or Quæstor (after the hearing of the Cause was at an End) gave each Judex or Juror three Balls of Wax; one was marked with A. for Absolutus, another with C. for Condemnatus, and a third with N. L. for Non Liquet, which signified as much as *finding it Special* among us, and adjourning the Cause, which was called *Ampliatio*, or putting it off for farther Consideration*. Hence we may explain that Passage in the Acts of the Apostles, cap. xxiv. ver. 25. *Go thy Way for this Time, when I have a convenient Season I will call for thee.*—Here Felix gave Paul the Benefit of the *Ampliatio* in the Roman Law, which was designed to give the Criminal more Time to recollect himself for his Defence, as well as the Judge to consider the Charge and Evi-

* Condemnandi nota est litera C. Absolvendi A. Ampliandi signum N. L. quod significabat *non liquere*, unde *Ampliatio* nascebatur. Ascon. Pædian. in Verr. 2.

dence.

dence. The first Letter A. Cicero pro Milone calls *salutarem*, or the *saving Letter*; the other, C. *tristem*, or the *unhappy*, because it implied Condemnation *. It was from this Action of the Quæstor of giving three Balls to the *Judices*, that he was said, *Judicia dare*, and the Use they put them to, whether of Acquittal or Condemnation or Doubt, was the precise Meaning of *judicare* or giving their Verdict, in the above cited Passage out of Cicero †.

If any of the 81 chosen to be on the Jury, or of the Number of *Judices* did not appear, they were allowed to make their Excuse, the Reasonableness of which the Court was to be Judge of: *Quæro si Lyfiades citatus Judex non responderit, excusaturque, Areopagites esse, nec debere eodem tempore Romæ et Athenis res judicare, accipietne excusationem is qui quæstioni præerit ‡?*—If *Lyfiades* after he had been summoned had not appeared, and sent an Excuse that he was one of the Judges of the *Areopagus*, and could not be at Rome and at Athens at the same Time—I ask, would the Quæstor or presiding Magistrate have accepted his Excuse?—From whence we learn, that in the Roman Jurisprudence it was the usual Practice to admit a reasonable Excuse for the Absence of those who were summoned to attend as *Judices*, or to be on the Jury.—Let us now compare this with our Law relating to the Default of Jurors. By the 35 Hen. VIII.

* Nec vobis tam *salutarem* nunc in judicando literam quam illam *tristem* dedisset. Cic. pro Milone.

† Omnes omnium pecuniæ positæ sunt in eorum potestate qui *Judicia dant*, et eorum qui *judicant* Prætor improbus det quem velit Judicem, Judex nequam et levis, quod Prætor jusserit, judicet. Verr. 2.—Observe here the Distinction between the Prætor and the Judex, the one was the Juryman, the other Judge.

‡ Ciceron. Philippica 5.

cap. 6. sect. 3. it is enacted, *That upon a reasonable Excuse for the Default of any Juror, proved before the Justices of Assize or Nisi Prius at the Day of their Appearance, by the Oaths of two Witnesses, the Justices shall have Authority to discharge such Juror of such Forfeiture of Issues, &c.* Can any one read these Provisions to one and the same Purpose, the first in the Roman and the other in the English Law; Can any one read this, and not immediately conclude that the *citatus Judex* of the Romans was the same with the English Juror, and the *Excusatio* of the one, was the same with the *reasonable Excuse* that was to be admitted for the Default of the other? Besides, the Excuse of this *citatus Judex* was to be offered, and approved or rejected by the presiding Magistrate—*is qui quæstioni præerit*—which evidently shews, that the *citatus Judex* could not be a Magistrate, because he was responsible to him: If therefore we put all these Circumstances together, and compare the Duty of the *Judex* among the Romans with the Office of the *Juryman* in our Law, we shall find such a Correspondence in all the Parts, as will put it out of all Doubt that they were, as to their Origin and Principles, one and the same Kind of Institution, and differed no otherwise than according to the Modes of Government in each Country. When the Prætor or *Judex Quæstionis* had taken the Ballot, by which the Judges or Jury gave their Verdict, his Business was to *declare* the Numbers for Condemnation, Acquittal, or adjourning the Cause. This *Declaration* of the presiding Magistrate was called *Pronunciare*—*palam de sella ac tribunali pronunciat*, Cic. de Verre Prætor in Sicilia. Verr. 2. And de finibus, lib. i.—Torquatus *re ex utraque parte audita, pronunciarer eum non talem videri.* Hence Brissonius de formulis, lib. v. p. 480. 4to.—*In consilium vero missis Judicibus quod majori parti placuit, id Judex Quæstionis pronunciabat*—*What the Jury agreed upon,*

the Judex Quæstionis pronounced. And Sigonius de Judiciis, lib. ii. c. 6. more expressly—Judices vero dicti sunt, qui ex lege ad judicandum adhibiti sunt; quorum sententiam Prætor ipse pro tribunali pronunciavit. —The Office of the Judices was *Sententiam ferre*, to give their Verdict, which they did by Ballot as before described, and the Prætor or Judex Quæstionis, or President of the Court, pronunciavit, *declared it*; which is an undeniable Proof, that the *Judices* were not presiding Magistrates, but like our Jury, they gave their Verdict, *Sententiam ferrent*, which the Prætor, or whoever else was the President of the Court, *pronunciavit—declared*.

Before we quit this Subject, it will not be foreign to our Purpose to observe, that in the Trial of Milo, we read of something like a *Special Jury*. It was apprehended from the great Men who took Part in the Quarrel and the Affair of Cicero and Clodius, that had divided the City of Rome, that the Trial of Milo for the Murder of Clodius would be attended with great Disturbance and Confusion, particularly as the Clodian Party were powerful, and ready for any Enterprize against Milo and his Friends. They had often come to Blows even in the Streets, and carried their Animosities to a very great Length, with this Difference however, that Milo was thought to have the Right on his Side *.

It happened to be at that Time of the Year that the Magistrates were to be elected, and Milo stood for the Consulship, and Clodius to be Prætor. The Opposition between them ran so high, that in short the public Meetings could do nothing, and there was neither

* Sæpe inter se Milo et Clodius cum suis factionibus Romæ depugnaverant, et erat uterque audacia par, sed Milo pro melioribus partibus stabat. Ascon. Padian. Arg. pro Milone,

Consul or *Prætor*, nor other Magistrate chose; so that every thing was in Anarchy and Confusion. The Senate therefore, with the Assistance of the Tribune of the People, made an Act, *That the Interrex, the Tribune, and Pompey should take care that the Public suffered no Damage*: Upon which it was resolved, that Pompey should be created *Consul sine Collega, sole Consul*. The Power was near the same as that of the *Dictator*, which was, *videre nequid detrimenti respublica caperet*; but as the Name of a *Dictator* had grown odious to the People by the Cruelty and Proscription of Sylla, which was fresh in their Memory, it was thought most adviseable to proceed in this Manner not to exasperate the People, who were ready to take Fire at the least Spark. Pompey therefore was created *Consul Extraordinary*, with absolute Power for the above mentioned Purpose *. When therefore they were to proceed on the Trial of Milo, in order to obviate all Suspicion of Partiality in himself, as being a Friend to Cicero the Counsel for Milo, and to take away all Pretence from the Malecontents of crying out against Corruption in the Jury, a Practice but too well known and felt just before under the Tyranny of Sylla, Pompey appointed a Jury of the most upright and able Men in all Respects, and created Cn. Domitius Ænobarbus to be *Quæstor* or Judge on the Trial of Milo, as a Man of Consular Dignity.—Optimos viros legerat idque maxime ad fidem suam pertinere arbitraretur. A little before Cicero pro Milone says of this Jury—Pompeius delegit e florentissimis ordinibus, ipsa lumina, neque vèro quod nonnulli dictitant, secrevit in Judicibus legendis amicos meos. Of this Number was the famous *Cato Uticensis*, as we learn from the same Oration—Avunculus hujus nostri Judicis fortissimi viri Catonis, &c. And again, Te Q. Perili appello optimum et fortissimum Civem, Te M. Cato testor,

* See Acon. Pædian. in Milone.

quos mihi divina quædam fors dedit Judices. So far of the Integrity of the Judices. Let us now see the Character of the Judge or Quæfitor, Domitius Ænobarbus, drawn by the same Hand.—Quod, vero Te, Cn. Domiti, huic Quæftioni præeffe maxime voluit, nihil quæfivit aliud nifi juftitiam, gravitatem, humanitatem, fidem; tulit ut Confularem necesse effiet, credo præcipuum munus effe ducebat, refiftere et levitate multitudinis, et perditorum temeritati—*Ex Confularibus te creavit* potiffimum; dederas enim quam contemneres populares infanias jam ab adolescentia documenta maxima. Here we fee the fupreme Power, on Account of this Trial, lodged in a Manner unusual in the Hands of Pompey, with abfolute Authority. Here we fee the ufual Method of appointing the *Judices* or *Jury* fufpended, and one chofe by the fole Direction of the Conful, optimi viri et ampliffimi ex caufa, Men of the moft refpectable Characters for Virtue and Property, inftead of the common Way of *Ballot*, which would have taken in all Ranks without Difinction. And as to the Quæfitor or Judge in the Caufe, he that ufed to be chofe fuffragiis populi, by the People, was in this Cafe appointed by the Conful out of the Perfons that had been Confuls, and had filled the higheft Offices of the State—*Ex Confularibus te Domiti creavit*. And it is to be obferved here, that he is called Cic. pro Milone—*ifti præpofiti quæftioni*. So that Afcon. Pædianus Arg. pro Milon. had good Reason to fay, that there never were more eminent and upright Men on any Jury, than thofe which Pompey picked out for this—*Aliorum quoque judicium qui de ea re judicarent, Pompeius tales propofuit ut nunquam neque clariores viros neque fanctiores propofitos effe conftaret*. And it feems to me that Cicero had a View to this new Kind of judicial Procefs by a Special Jury, as well as the unusual Appearance of the Army at the Trial, when he fays at the Beginning pro Milone, *Hæc novi judicii nova forma, &c.*

Upon a Review of all these Circumstances, where there was a Departure from the usual Method observed in common Trials, where the worthiest and ablest Men were chose in order to obviate the least Suspicion of Corruption or Partiality in Judge or Jury; What can we call this but a *Special Jury* or *Magna Assisa*, exactly answering the Meaning of those Words in our judicial Proceedings?

It is observed in the former Part relating to Juries among the Greeks, that they measured the Time allowed the Counsel to speak in by the dropping of a certain Quantity of Water. This Custom the Romans copied also in the same Case. Cicero calls *that Time* the legitimæ horæ, or Space allowed by Law for the Advocates to speak in. Cic. Verrin. lib. i. Dion Cassius, or his Abridger Xiphilin, speaking of the Emperor Marcus Antoninus, says, he used to sit in Judgment, and ordered *Plenty of Water*, i. e. *Time enough* to be allowed the Advocates for pleading*; and of Severus, that at Trials he gave *sufficient Water*, i. e. *Time*, and allowed us, i. e. his Assessors, *free Liberty of Opinion and Speech*†. Pliny in lib. vi. ep. 2. makes mention of this Custom of measuring Time by Water—Quoties Judico quantum quis plurimum postulat aquæ do—When I sit in Judgment I give as much Water, i. e. Time, as the Advocate requires. And Cicero alludes to this Custom, when, in the 2d Book of Tusculan Questions, he says, *Cras ad Clepsydram*. Other Instances of this Practice are frequently to be met with in the Roman Authors; and I have taken notice of it here, because, as in the former Part relating to the Greek Jury, it

* — εδικαζε και υδωρ πλειον τοις ρητορσι μετρεισθαι εκελευε. Dion. in Marc. Antonin.

† — τοις δικαζομενοις υδωρ ικανον ενεχει, και ημιν τοις συνδικαζουσιν αυτω παρησιαν πολλην εδιδε. Dion. Cassius de Severo.

hath been mentioned; so likewise we may observe, that this Usage was retained by the Romans in Imitation of the Greeks, from whom also they used the Word *Clepsydra*, as a Measure of *Time by Water*: In short, as the whole Institution of a Jury was an Imitation of that Usage among the Greeks, so most of the lesser Circumstances attending it, were retained likewise by the Romans.

Let us now take a short View of the *Judices of Rome*, according to the Description before given of their Number, Office, and other Circumstances attending their Institution.

The *Judices* were a Number of People chose once a Year out of all Ranks to try criminal Cases, out of which Number a select Jury was ballotted on every Cause, amounting to 81, out of which the Criminal and Accuser had a Right to challenge 15 each; so that the remaining 51 were impanelled to try the Indictment. If any one did not appear, he had his Excuse allowed, if, upon Examination, it was found reasonable. They were then sworn to give a just Verdict, after which they heard Evidence, then got up and went out to consult on the Verdict. When they returned, they delivered their Opinions by Ballot, which was received by the Prætor or *Judex Quæstionis*; and when he had reckoned the Voices for and against the Criminal, *pronunciavit*, he declared the Numbers, the Majority of which determined either the Condemnation or Acquittal. From all which it appears, that the *Judices* were not *Presidents on the Bench*, nor *Prætors*, nor *Judges* or *Magistrates* in any Shape; but an Institution in favour of Liberty acting in criminal Trials upon the same Principles, and in the same Method as an English Jury.

USE AND FRANCHISE OF THE

both have mentioned the license of the franchise, the latter was granted by the Government in 1880, and the former was granted by the State of New York in 1881. The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881.

The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881. The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881.

The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881. The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881. The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881.

The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881. The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881. The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881.

The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881. The license of the franchise was granted to the State of New York in 1881, and the license of the franchise was granted to the State of New York in 1881.

Fortunes of their fellow Citizens. This, among many other wise
 founded; by which it was provided, that no Rank or Order among
 the Citizens should have so much Power as to oppress or injure the
 other, but that such an exact Balance should be observed through all
 Parts of the Constitution as should produce such an Equality, where
 among them, as consisted in a Right of consulting to the Laws they
 were bound by, and a Participation in the judicial Execution of

INTO THE

USE and PRACTICE of JURIES.

PART III.

Of the Origin and Principles of the Institution called a JURY in ENGLAND.

WE have seen in the former Parts of this Tract, the Use of
 an Institution among the Greeks and Romans, that
 answered the Purposes of what in the English Polity is
 called a *jury*; and from whence in all Probability that Custom
 among us was derived. When Solon settled the Laws and Govern-
 ment of Athens, he established it upon Principles that tended to
 put the lower People out of the Reach of the Power and Oppression
 of their Superiors; and to this End, he appointed the *Judicatory*,
δικαστήριον, to be chose by Ballot out of all Ranks, well knowing that
 Liberty lay no where so much exposed, as at the Tribunal where the
 Great presided, and who were therefore Masters of the Lives and

Fortunes of their fellow Citizens. This, among many other wise Regulations, was the Basis on which the Athenian Polity was founded; by which it was provided, that no Rank or Order among the Citizens should have so much Power as to oppress or injure the other, but that such an exact Balance should be observed through all Parts of the Constitution, as should produce such an Equality, *ισοτης*, among them, as consisted in a Right of consenting to the Laws they were bound by, and a Participation in the judicial Execution of them.

This public Attention to the natural Rights and Liberties of the People, greatly contributed to the happy State of things at home, and set them in such a high Point of Light, as to make them the Object of Admiration, and an Example for the Imitation of the neighbouring States.

Accordingly, when the Romans found themselves free from the Tyranny and absolute Power of their Kings, and had attempted a more liberal Plan of Government for sixty Years together, but without Success; they agreed to send to Athens for a Transcript of those Laws that had been there introduced by Solon, and seemed to be well adapted to their present Necessity, and well calculated to allay the Heats of a perpetual Contest that then subsisted between the Patricians and Plebeians, particularly as to that Point, *What should be the Form of judicial Government, and out of what Orders the Judges or Jury should be chosen*; for, as the Laws of Solon were favourable to public Liberty, and made the Foundation of a permanent Democracy, after various Changes of Government among the Athenians; so nothing could be more suitable to the present unsettled

settled State of Rome than the Introduction of those Laws into *their* Polity, which had established Liberty, and happily put an End to all Contentions and Disputes about Power at Athens.

To this Purpose an Embassy was appointed, and the End of it obtained; so that the Grecian Laws and Principles of Government were admitted as the Plan of civil Polity at Rome.

Among other Laws that favoured the lower People, Solon appointed a *Δικαστηριον*, that is, a Body of Men chose out of all Ranks, to try and determine capital Cases in the Manner of *our Jury*. See p. 22, 23. In Imitation of this, the Romans, as we have already seen, had their *Judicia*, the Circumstances of both which, corresponding with our Trial *by Jury*, have been above taken notice of, and considered.

From the Time of the Return of the Decemviri, and the Admission of the twelve Tables of Athenian Laws, the Roman *Judicia*, formed on the Plan of the Greek *δικαστηριον*, were in constant Use, though with some Alteration with regard to the Members that composed that Body; for the Oppressions of the Great, and the Jealousies of the lower People, caused the Administration of that Trust to be frequently changed from the Senators to the Equites and common People, so as to produce great Contests and Dissentions between the several Orders—At last, it was settled in the Nobles, Gentry, and Commons equally, out of which three Orders a Number of *Judices* or *Jury Men* were *annually* to be chose, amounting to about six hundred; out of which all ordinary Juries upon common Causes were to be taken.

This was the State of the *Judicia* or *Jury* at Rome, when Julius Cæsar extended the Roman Name, Laws, and Customs into the Conquests he made, and the Provinces he settled in Gaul, Germany, and other Countries—For we are told by Suetonius, that he conquered all Gaul within the Pyrenees, the Alps, and Mount Gebenna, and the Rivers Rhine and Rhone; and with the associated Cities reduced them all into the Form of a Roman Province; and then passing over the Rhine into Germany, was the first Roman that carried his victorious Arms thither *. What was meant by reducing into the Form of a Province, or in the Words of Suetonius, *in provinciæ formam redigere* ? — *In provinciæ formam redigere*, says Sigonius †. *Est cum adeptis aut immutatis legibus eos omnino magistratui Romano quotannis ab urbe mittendo subjecit, ac vectigalia conventusque constituit imperator*—That the General reduced the conquered Countries into a Province, by which they lost their own Laws, and were to be governed by those of Rome; and to pay such Taxes, and submit to such Ordinances as were appointed by him. And in the same Chapter, he says, *Provincia nulla fuit, quæ non Romanum prætorem ac quaestorem habuerit, illum qui jus diceret, hunc qui vectigalia procuraret*—There was no Province which had not a Prætor as a Magistrate and a Quæstor to collect the Taxes. And that the very Essence of a Province consisted in using the Roman Laws, instead of those that were practised by them before their Subjection, appears from Cæsar Bell. Gallic. Lib. vii. c. 77. where he introduces

* *Omnem Galliam quæ a saltu Pyrenæo Alpibusque et monte Gebenna, fluminibus Rheno, Rhodanoque, continetur, præter socios et bene meritas civitates in provinciæ formam redegit*; Germanos qui trans Rhenum incolunt primus Romanorum magnis affecit cladibus—Suetonius in Vit. Cæsaris.

† Sigonius de antiquo Jure provinciarum, lib. i. c. 1.

Critognatus saying:—*Respicite finitimam Galliam, quæ in provinciam redacta, jure et legibus commutatis, securibus subjecta perpetua premitur servitute*; by which is intimated, that the Change of the Laws of their Country for the Laws of the Conqueror was one of the highest Instances of Servitude. In this also the chief Difference between a *Municipium* and *Colonia* consisted; for in the Words of Aulus Gellius, *Municipes jure suo et legibus suis utentes, muneris tantum cum populo Romano horarii participes, a quo munere capeffendo appellati videntur*—*Sed coloniarum alia necessitudo est, nam jura institutaque omnia populi Romani, non sui arbitrii, habent*—i. e. the *Municipes* used their own Laws and Institutions, and bore Offices at Rome, whence a munere capeffendo, they had that Denomination—Whereas the State of the Colonies was widely different, for they were obliged to use the Roman Laws and Jurisprudence, and not those of their own *busing* *.

Wherever therefore a conquered Country was reduced to a Roman Province, or Colonies were settled, there the Roman Laws and Institutions were established and used. And from this Use of the same Laws in the Colonies as were practised and observed at Rome, came the Phrase of *populus fundus factus*—Cic. pro Balbo. by which was meant, as Cicero himself explains it, *Ut cum jussisset P. Rom. aliquid, si id aseivissent socii populi ac Latini, et si ea lex quam nos haberemus, eadem in populo aliquo tanquam in fundo resedisset*—*ut tum lege eadem populus teneretur.*—Ibid. pro Balbo.—*That where any People received the Laws of Rome, they became thereby, as it were, a Farm belonging to the Public.*—Now we find, that under

* Aulus Gellius, lib. xvi. cap. 13.

Claudius, Britain was a Province, and that Ostorius dying there, he appointed A. Didius in his Room, *ne provincia sine rectore foret.* Tacit. Annal. 12. And Tacitus, Vit. Agric. says expressly, *Redactaque paullatim in formam provinciæ proxima pars Britanniae, addita insuper veteranorum colonia*—That under Aulus Plautius and Ostorius Scapula, Britain was reduced into the Form of a Province, and a Colony of Veterans was established there. There were also at this Time, or not long after, four Colonies planted here—one at *Camalodunum* or *Maldon*, one at *Deva* or *Chester*, one at *York*, and a fourth at *Glevum* or *Gloucester*; so that no Doubt can be made, but that the Roman Laws and Institutions were received in Britain in the utmost Extent; for we are told by Tacitus, Annal. 12. that the Colony settled at *Camalodunum* was not designed so much to be a Check on the Rebels, as to teach and accustom the new Conquests to a Familiarity with the Roman Laws—*Imbuendis fociis ad officia legum.*

We learn from Cæsar *, that the Administration of Justice in Britain was lodged for the most part in the Druids; till Claudius, to make way for the more easy Introduction of the Roman Law and Judicature, prohibited the Druids presiding in the Courts of Law, as they were used to do; so that by Degrees the Britons were accustomed to the Decisions of the Roman Lawyers, and took a Taste for the Roman Law and Literature, so far as to go over to Gaul to be instructed in it; according to Juvenal,

Gallia Causidicos docuit facunda Britannos. Sat. 15.

* Fere de omnibus controversiis publicis privatisque constituunt (Druidæ) et si quod est admissum facinus, si cædes facta si de hæreditate, de finibus controversia est iidem decernunt, præmia pœnasque constituunt. Cæsar de Bello Gallico, lib. vi. c. 13.

Soon after they became so reconciled to the Arts and Rhetoric of the Bar, that they who at first could not bear the Roman Language, shortly after affected even the Graces of Eloquence, as we are told by Tacitus, and from thus adopting the Language and Laws, they soon assumed the Dress; and thence they took one Step farther into the Elegance of Luxury, Building, Baths, and making Entertainments, and fondly called that Politeness, which in Fact was no other than a Badge of their Slavery *. It is this Law of the Conquerors that Caractacus reminds his Countrymen to keep off, as their Ancestors did in the Time of Julius Cæsar, when he says, *quorum virtute vacui a securibus et tributis*, Tacit. Annal. 12. *by whose Valour they were freed from the Laws and Tributes intended to be imposed by the Conqueror.*

The Admission, however, of the Roman Law into Britain after the Conquest of Claudius, was attended with the natural Consequence, the Arrival of the Roman Lawyers; and by the Time of the Antonines, we find the Names of Volutius, Martianus, Marcellus, Servitius, Scævola, Lawyers in Britain; and those great and respectable Names, Papinian, Paullus, Ulpian, and Dion Cassius, with many others (whose Decisions make a Part of the Code and Digest) attending Severus in the Law-Courts held at York †. Under this Reign of Severus, the Roman Laws were in their highest Authority in Britain, and so much Attention was shewn by the

* *Ingenia Britannorum studiis Gallorum anteferre, ut qui modo linguam Romanam abnuebant, eloquentiam concupiscerent, inde etiam habitus nostri honor, et frequens toga, paulatimque discessum ad delinimenta vitiorum, porticus, balnea, et conviviorum elegantiam; idque apud imperitos humanitas vocabatur cum pars esset servitutis*, Tacit. Vit. Agricola.

† See Capitolinus, Spartianus, Lampridius, Dion Cassius, &c. in Severo.

Emperor to the due Discharge of Justice, that we are told by Herodian, when he went to the Wars, he left his Son, Geta, behind, to preside in the Law Courts of Britain, with proper Assessors, particularly Papinian, and took Bassianus along with him into the Field *. This Court of York, where Severus or his Son presided, was famous at that Time for a Decision made by them in Favour of Cæcilia, upon a Question of Right, which is to be found in the Codex, lib. iii. Tit. 32. *de rei vendit.*—*Etiam per alienum servum bona fide possessum, ex re ejus qui eum possidet, vel ex operis servi acquiri dominium vel obligationem, placuit.*—*Quare si tu quoque bona fide possedisti eundem servum et ex numm's tuis mancipia eo tempore comparavisti potes secundum Juris formam uti defensionibus tuis—mancipium autem alienum mala fide possidenti nil potest acquirere, sed qui tenet, non tantum ipsum, sed etiam operas ejus nec non ancillarum partus—et animalium fœtus reddere cogitur.*—P. P. 3 Non. Maii, Eboraci, Faustino et Rusto Coss.—Upon the whole, the Roman Laws obtained in England in full Effect from the Time of Claudius, A. D. 50, to the Time of Honorius, about 410, i. e. about 360 Years after, when Rome was taken by Alaric the Goth.

This is the End of the Use of the Roman Law as such in Britain, where it was succeeded by such Laws as they agreed upon among themselves. For Zosimus observes, *that when the Romans retired to defend Rome and Italy against the Incursions of the Goths, and were no longer able to protect their Conquests in Gaul and Britain; that these last were encouraged to throw off their Dependence on the Romans, and live by Laws of their own framing—And*

* Herodian. in Antonino Geta.

that in Imitation of the Britons, some other Celtic Nations asserted their Liberty, ejected the Roman Governors, and established a new Polity of their own.* And Agathias, speaking of the Franks of these and later Times, observes, that for *the most Part they used the Roman Law and Mode of Government, and particularly in their Contracts, Marriages, and Religion* †. — This seems to have been the Case, wherever the Roman Conquests upon the Irruption of the Goths withdrew their Obedience from the Romans, and set up for themselves. — They retained in their new System many of the Roman Laws, which added to their own Customs and Institutions, became the Code of Laws that they were governed by. — We find this Composition was the precise Form of the Laws of the Ostrogoths and Theodorick, of the Wisigoths of Gaul and Spain, under Alaric II. who employed Anianus, A. D. 506. to draw up a Body of Law out of the Roman civil Law, joined to their own Customs and Edicts. — This was likewise the Plan of the Caroline Capitularies, and is the very Form of Government at this Day in most Parts of Europe, which consists of certain Parcels of the civil Law, adapted to the Constitution of the several States, to which are added their own Customs and Ordinances ‡.

* Της Ρωμαίων αρχῆς ἀποσῆναι, καὶ καθ' ἑαυτῆς βιοτενεῖν, καὶ ἐπὶ τοῖς τεττῶν ὑπαρκούσης νομοῖς τῆς Βρεταννῆς μιμησάμεναι κατὰ τὸν ἰσὺν ἡλευθερωτῶν τρόπον, ἐκβάλλουσι γὰρ τῆς Ρωμαίας ἀρχούσας, οἰκεῖν δὲ κατ' ἐξουσίαν πολίτευμα καθίσταται. Zosim. Histor. lib. vi.

† Καὶ πολιτεία, ὡς τὰ πολλὰ χροῦνται Ρωμαϊκῇ καὶ νομοῖς τὰς αὐτὰς, καὶ τὰ ἄλλα ὁμοίως ἀμφὶ τὰ συμβόλα καὶ γάμους καὶ τὴν τῆ θεῆς θεραπείαν νομίζουσιν. Agath. Histor. Justin. lib. i.

‡ See Montesquieu de l'Esprit des Loix, tom. iii. p. 253.

And as their Laws were a Collection of civil Law and provincial Customs, so their Language was composed of the Latin Tongue, mixed and blended with the Celtic, Gothic and Gallic Dialect, which is the present State of the Language of those Countries where the Romans extended their Conquest, or the Goths dispossessed the Romans; it being formed out of the mutual Intercourse of these People, and obtained most in Proportion as the one or the other prevailed.

The Use I would make of this Argument is to shew, that wherever the Romans turned a Conquest into a *Province*, or planted a Colony in it, there the Roman Laws and Institutions were received and used; the Consequence of which might probably be, that the Customs and Ceremonies attending the Execution of these Laws might be wove into the Manners and Constitution of these People by the Practice of 3 or 400 Years, so as by this Length of Time to become a Part of their civil Polity; — and what was at first a Roman Law, and Mark of Servitude, by long Usage came to be forgotten as such, and considered only as an antient Prescription of Time immemorial. — Now we have seen in a former Part of this Enquiry the *Judicia* or Jury in Use among the Romans, and as they sent their Colonies into these northern Conquests, and established their Laws very early in Gaul, Germany, and Britain, we have good Reason to believe, that among other Remains of Laws and Language, they left us also this of a *Jury*; — I mean that we have good Grounds to suppose, that the *Judicia* of the Romans were used in their Colonies, and that the Jury of the northern Provinces is a Remain of the Roman *Judicia*: — And, indeed, why should we not retain the *Judicia* or Jury as well as many other Customs
and

and Usages, which, as they are discoverable in the northern Polity, are as certainly of Roman Original; particularly the feudal Rights of the Lord from his Vassal, of *paying his Debts, portioning his Daughter, and redeeming his Person from Captivity*, are an Imitation of the Roman Law relating to the Duty of a Client to his Patron, — as is mentioned before, p. 78, 79. — The *Challenge of the Jury*, which is directly the *Rejectio Judicium* among the Romans; the *Compurgators* upon a Trial, is an evident Imitation of the *Laudatores* among the Romans, and the chusing the Jury out of the Vicinage, is a plain Copy of the Roman Proceeding in the Impannelling the Jury out of the Neighbourhood *Decuriatio Tribulium*, and that, because of the *Certissima Scientia*, the certain Knowledge that they might be supposed to have of the Fact from their Vicinity*; — of which several Particulars I shall take more Notice hereafter; it will be sufficient at present to observe, that where we see so many Circumstances among the Romans which correspond with our Method of Trial by a Jury, we can make no Doubt but that the whole Mode of judicial Process by a Jury was originally taken from the *Judicia* or criminal Trial brought thither by the Roman Colonies; — at least it is a much more reasonable way of accounting for its being found among us, than having recourse with Sir William Temple and others to the groundless Story of Woden or Odin, and his Introduction of it with the Asiatic Goths, or Getae, into Europe; of which Expedition no Time can be assigned, no certain historical Facts mentioned by cotemporary Authors, laid down to guide our Enquiry; — so that what we hear of Wodin or Odin is little if any thing more than what Edda and Saxo are

* Cic. Orat. pro Plancio.

pleased to tell us; which Spelman allows to be of little or no Authority, as well as the Accounts of him which are more modern; *sed ut omnia tum sua, tum nostra incerta sunt quæ de eo narrantur, non opus est ut ea conferamus* *.

But as legal and political Institutions are the Productions of civilized Nations, and the Result of Wisdom and cultivated Nature, it is not to be expected that we should meet with the Origin of so beneficent, so liberal an Establishment among a wandering barbarous People, such as the Scythians, who, not having any settled Habitation, had no fixed Government, and consequently in their Migrations could have no need of permanent Laws or Rules of Polity. — In that, as in all similar Cases, the Will and Discretion of the Leader was to direct and judge, which we have seen to be the Fact with regard to the Romans, in their original State of Barbarity and Rudeness, and to be the very Plan of Government among our first Saxon Ancestors. — So likewise we may conclude, that it was the State of the Getæ when they were led out of Scythia in quest of new Settlements. — They could have no Laws or Rules for ascertaining or determining Property by, who knew no other Title than the Sword. — They could have no Notion of distributive Justice, who were ready to seize by Violence whatever lay in their Way. — Civil Disputes with Strangers they could have none, and among themselves, their Leader was their Judge.

It has been before observed, that a Jury was the Child of Liberty, and the Consequence of a natural Right that every Man has to the Safety of his Person, and the uninterrupted Possession of his Pro-

* Spelman in Vit. Ælfredi Magni, p. 1. not. b.

erty. If so, what well regulated Liberty, what legal Property can be supposed to belong to such a Banditti as these Scythian Getæ, who were not possessed of any permanent Rights, but declared Enemies to Order and Policy, and supported in their collective Capacity only by Plunder, Spoil and Devastation. Surely these were not Circumstances likely to produce such a salutary Provision as a *Jury* for the Defence of Person and Property, from the Violences of superior Power.

If it should be said, that although they might not make any Use of these Formalities in their Migrations, and shew no Attention to any thing but gaining Settlements by Force and Violence, yet when they became possessed of Property they made Use of those Means for the quiet Enjoyment of it, with the Defence of their Persons, *which were in common Use in the Country which they had left.* — But who knows not that the Scythians and Getæ were the Names of Barbarity itself. — St. Paul, Ep. Coloff. iii. 11. joins *Barbarian and Scythian together*, as synonymous Terms. What Probability then is there, that so wise a Provision as a *Jury*, so well calculated for the Peace and Welfare of Society, and such as did the greatest Honour to the most accomplished People in the most glorious Period of their History, I mean the Greeks, at the Time of the Establishment of the Commonwealth by Solon; what likelihood is there that such an Institution should make a Part of the Polity of a People, known even to a Proverb to be the most savage, lawless, and uncultivated in the World? — But how should they come at the Knowledge of such an Institution, as Sir William Temple supposes to be coeval with the Establishment of the Asiatic Goths or Getæ in Europe? In their Situation of Adventurers, they had not
any

any need of such Defences of Person and Property, as having yet no Settlement, nor any social Rights. — And as to the Custom of the Country they had left, it is not probable that the rudest of Mankind should be the Depositories of such Regulations, as were indisputably the Productions of the most refined Wisdom, Understanding and Policy.

But to give this Hypothesis its full Weight, I will lend it an Argument, and try to give it an Air of Possibility. — When Solon established his celebrated Plan of Government at Athens, one Provision was for the Appointment of a Body of Men called Δικασται, *to be annually chose out of all Citizens, to try, like a Jury, all criminal Prosecutions*, as we have seen above. — At that Time Anacharsis, the Scythian, came to visit him and the rest of the choice Spirits of that Time, that made Athens celebrated even among Barbarians; and after having admired the Abilities of Solon, his Plan of Government, and the Utility of those Laws which were framed by him for the Conduct and Administration of it, he departed for his own Country, where, endeavouring to introduce the Grecian Laws and Polity, instead of those used in Scythia, he was put to Death by his Brother Caduides, the King, at a hunting Match, as we are told by Laertius Diogenes *.

If this Design had succeeded, and the Grecian Laws and Plan of Government had been received by the Scythians, we might then have had some Pretence for supposing that the Greek Δικαστηριον or

* Σολων αδελφος Καδυιδου των Σκυθων βασιλεως νομιζων τα νομιμα παραλθειν της πατριδος πολυς ων εν τω ελληνιζειν, τοξευσεις εν τω κυνεγησειω προς τα αδελφου τελευτα. Laert. Diogen. in Vita Anacharsis, lib. i.

Jury had been the Model of a like Institution in Scythia, from whence, in after Ages, it might have been brought by Odin and the Asiatic Getæ in their European Conquests. — But it was so far from it, that we have seen Anacharsis murdered by his Brother the King, for attempting Innovation, and proposing to introduce the Policy of Greece in the Place of the Customs of Scythia, and the Laws of Solon instead of the Dictates of Barbarism. If Anacharsis had happily succeeded, and made the Athenian Laws the Foundation of the Scythian Government, there might have been something like a Possibility, that the Remains of the Grecian *δυναστεύειν* might have continued among the Scythians and Asiatic Getæ, till the Time that *Odin* or *Woden*, their Leader, brought it into Europe; — but as he failed in his Attempt, which cost him his Life, it is not probable that they could have learned it from any where else abroad, and much more unlikely that it was the Production of their own Sagacity at home.

Let us take Measure of the Genius of these People for Politics and civil Government, from the Letter even of Anacharsis himself to Hanno, who would have made him a Present of Money. This Letter, Cicero Tuscul. Quæst. lib. v. renders thus in Latin. *Anacharsis Hannoni salutem — Mibi amiētus est Scythicum tegmen, calceamentum solorum callum, cubile terra, pulpamentum fames, lacte caseo carne vescor, quare ut ad me quietum licet venias, munera autem ista quibus delectatus, es vel civibus tuis vel Diis immortalibus dona.* — *Anacharsis to Hanno, greeting. “ My Dress is a Scythian Covering; “ my Shoes the Callus of my Feet; my Bed the Earth; Hunger my “ Sauce; I eat Milk, Flesh and Cheese; so that as I can live thus, you may “ bestow your Presents, which you place such Value on, either to your*
“ own

"*own Country Men, or to the Gods* *." — If therefore, their great Philosopher, with all his Excellencies and distinguished Rank (for we see he was of the royal Family) lived according to the Description he gives of himself, what Opinion can we form of the less eminent of his Countrymen, or of their Abilities to contrive the several Connections and Dependancies of civil Government, if they had any. — If the royal Family went *clad in Skins and barefooted, and lay on the bare Earth*, what can we think of the Life and Manners of the less illustrious among them, but that they were but one Degree above Brutes. — Perhaps it may be said, that his Search after Wisdom, and Travels into Greece for that Purpose, may induce us to suppose, that others of *his* Countrymen might have a Desire after Knowledge, and Talents that wanted only to be exercised, in order to make a distinguishable Figure; — and that where one wise Man was to be found, it is to be presumed many more of good Sense and Understanding were the Production of the same Country.

In answer to which, let us hear what Lactantius says, *that among the Barbarians there never was a Philosopher, except the Scythian Anacharsis; nor had he ever dreamed of Philosophy, had not he taken the Taste of it from the Language and Learning of the Greeks* †. Hence we see, that Scythia was reckoned by the Antients as a Country of Barbarians, where Philosophy never entered but in the Person of Anacharsis, which he got not in his own

* See also Clement. Alexandr. Stromat. lib. i.

† Ex barbaris nullum præter unum Anacharsim Scytham; qui philosophiam ne somniasset quidem, nisi et linguam et Græcas litteras ante didicisset. Lactantius de falsa sapientia, lib. iii. c. 24.

Country,

Country, but owed it to the Excellence and Discipline of Strangers, particularly the Intercourse he had with Solon, and the Philosophers of Greece, his Cotemporaries.

What shall we say then; can we hope to find such a political Constitution among those Barbarians as could only be the Work of a *Solon*, even among the most civilized and polished Greeks? By no Means; — there is not the least Probability that such a wise, equitable, and humane Institution as a Jury, could be the Contrivance and Usage of a People without settled Property, Plan of Government, or even seeming Abilities to form it. — If therefore, the first northern Settlers under *Woden* or *Odin* could not have the Use of a Jury in their Migrations, nor could have in all likelihood any such refined Polity in their own Country of Scythia, over-run as it was with Barbarism; — nor ever retained it from the Instruction of Anacharsis, who was slain for attempting to introduce the Grecian Laws and Polity into his own Country; — Where are we to look for the first Origin of it but among the Romans, who by their Conquests and Colonies in Gaul, Germany, and Britain, introduced their Laws, Customs, and Institutions wherever they went; for as we have before observed, it was of the Essence of a Roman Province or Colony, to use the Roman Laws and Institutions, we may well suppose, that where they were in Practice for three or four hundred Years, they became the Usage of the Country for the future; at least were so interwove with the Customs and legal Ordinances of the People, as in Time to be looked upon as their antient Polity and Constitution.

I know, indeed, that Bacon, in the Discourse of the Laws and Government of England, speaking of the Saxons, says, *supposes* them to be the Remains of Alexander's Army: and that their Government resembled much the Grecian Model before ever the Romans reached them; — that like the Greeks, the deliberative Part was in the Whole, the Executive in a few Chiefs; as Tacitus says of them, *de majoribus omnes, de minoribus principes, de Moribus Germanorum*. That they used likewise some Imitations of the Heliastic Court; that their judicial Proceedings resembled the Athenian, the Military the Lacedemonian Plan; and all this happened either from the Reliques of the Macedonian Army under Alexander, or the Neighbourhood of the Saxons to Greece, whence much of their Wisdom was derived into those Parts. — But as he has offered nothing in support of this Opinion but Conjecture, we may take the Liberty to enquire how or upon what Occasion the Soldiers of Alexander should come to the northern Parts of Europe. — What Inducement could they have to leave the milder Climates and Settlements, which we may presume they might have found in Asia, as many of their Comrades did, to go into the less inviting and distant Regions of Frost and Snow, uninhabited Mountains or dreary Plains. — And as to the Likeness of the Greek and Saxon Government, supposed to be owing to the Neighbourhood of Greece and Saxony, it proceeded from a different Cause. — For, as the Romans took their Laws and Institutions from Greece, and particularly in the Instance of the Heliastic Court, which we have seen above, p. 29. was a Court of Trial by Jury, and on which the Romans framed their *Judicium* or Jury; so when they sent their Colonies into Germany, they sent also their Laws and Usages along with them, and by these Means the Wisdom of Greece and the Practice of the Heliastic Court got among the Saxons in the Shape

of the Roman *Judicia*; and the Plan of the Greek Government, thro' the Channel of the Roman Jurisprudence, laid the Foundation of many Customs that had a Resemblance of the Greek, but in Fact were no other than an Imitation of the Roman Polity, which originally was derived from Athens; — so that the Jury among the Saxons and northern Nations was derived from the Roman *Judicia*, as the *Causa Proxima*, but both of them drew their Origin from the *πλαιν*, *Hælizæ*, or court of *δίκας* or Jury among the Greeks. — This was the Manner that the Resemblance between the Saxons and Greeks, spoken of by Bacon, was produced. Hence we may observe, that wherever the Romans settled their Colonies in Germany or Gaul, or the northern Nations in their Turn invaded the Roman Provinces; in the fifth Century; — the natural Consequence was, that by their mutual Intercourse and Participation of the same Laws, Language, and Customs, they insensibly learned the Polity, Language and Customs of each other. — Hence it is likewise, that the present Languages of Europe are, for the most Part, a Composition of the Roman, Celtic, and Gothic Tongues, each of which prevailed in the Composition, according as it was the Mother Tongue in the Country where it was used. — For Instance, where the German or Celtic was the native Language, it was discoverable above the Latin, which was adventitious. — But in Italy, the native *Latia* is the chiefest Part in the Italian Language, which is compounded of Latin and the Tongue of the Ostrogoths and Burgundians. In like Manner, we may Reason upon the Laws and Institutions of a mixed People, who were thrown together by the Fortune and Issue of War. The Conquerors enforced their Laws and Institutions on the Conquered, and in their Turn learned some of the provincial Customs and Usages; and indeed it is almost

impossible it should be otherwise, where a Community is made up of component Parts, that totally differ from each other; — they by Degrees imitate the Manners and Conduct of one another, and insensibly follow the Examples they daily see before them. By this Way of reasoning we may account for the Origin and Use of a Jury amongst us by the Channel of the Roman Jurisprudence, which, with their juridical Terms, was introduced into the Conquests and Provinces by the Colonies that were sent into them: So that, as we have seen this Institution beyond all Dispute among the Romans, it is much more natural and probable to derive it from thence into Britain with the Roman Laws and Polity, than to seek for it among Asiatic Goths under Woden; of whom and their History we know not any thing beyond Conjecture.

We are thus far well founded — That when the Romans sent their Colonies into Gaul, Germany, and Britain, they carried their Laws and judicial Practices along with them, which they used in the same Manner as they were at Rome. Now, that the *Judicium* or *Trial by Jury*, was *then* in Use, and Part of the Roman judicial Proceeding, though perhaps not in its full Vigour, we may learn from Quintilian, in his Declamations, where he addresses the *Judices*, according to the usual Forms at the Time of Cicero, and shews that they retained the accustomed Method of giving their Verdict at his Time, which was under the Reign of Domitian. In Declam. 313, he speaks of a *Jury*, who, according to the usual *Formula*, declared their Opinion, and delivered their Verdict *to the best of their Knowledge, se ex animi sui sententia facere profiterentur**: And in another Passage of the same Declamation, he says,

* See p. 127.

non est ista res Judicium, non horum qui ad certa Jura et quidem jurati confederunt — That Matter does not belong to the Cognizance of a Jury, who are sworn to give their Verdict according to express Laws, whenever they sit upon any Trial. Upon which we may observe, that the Words *judices jurati confederunt*, were retained by Quintilian in the same Sense under Domitian, as we have before seen them used by Cicero under the Commonwealth*. So that we may justly conclude, that as the *Judicia* or *Trials by Jury* were in use so low as the Time of Domitian, they were carried out by all the Colonies, which were sent into new Conquests *before that Time*, and made a Part, according to antient Custom, of the Provincial Law. When therefore the Romans retired from these northern Provinces to defend their own Country and City, attacked by Alaric; the Laws, Institutions and Customs that had been introduced by their Colonies, did not depart along with them, but being left behind, continued a Part of that Polity, into which they had been interwove, and became, as it were, the natural Law of the Country, from the Practice of three or four hundred Years past.

That several of the Roman Laws and Customs remained in the northern Colonies after the Departure of the Romans, we may learn from the many Traces of them, discoverable in the Gothic History and Constitution, particularly in the Manner of settling their Acquisitions in their Migrations, which was the same as the Romans made use of in sending out their Colonies. — We have seen above, p. 76, 77. that when the Romans settled their Colonies, they reserved upon each Grant so many Men, and so much Money, to be employed in the Defence of the Mother Country or the Public; in Imitation

* See p. 44 and 120.

of this, the Gothic Conquerors, when they divided out their Conquests to the Adventurers, reserved the Service of a stated Number of Men, at the Expence of the Tenant, to defend not only his own Fee, but the general Rights of the Community :— So likewise when the Lord invested the Tenant with a Portion of the conquered Lands, there were certain Conditions annexed to the Grant, which were, *paying the Lord's Debts, contributing to the Ransom of his Person, and portioning his Daughter*; all which were near the same Instances in which the Client was bound to his Patron by the Roman Law; and whence the northern Nations, by their Interourse with the Romans, and the Use of their Laws, learned to apply them to their own Purposes. — If therefore these Usages were evidently deduced from the Roman Customs practised in their Colonies, why may we not with equal Reason believe, that the Jury of the northern Provinces was a Remain of the *Judicia* which had been practised by the Romans in their Colonies. — Thus we may conceive the Suevi became possessors of their Jury, which Sir William Temple ascribes to Woden or Odin; and thus the Celts and Franks became acquainted with that Institution*, which probably laid the Foundation of the twelve Jurats in Gascony.

When the Saxons and Angles came into Britain, about A. D. 430. they brought with them the Manners and Customs of their Country; and as the Romans had been sending into Gaul and Germany, Dacia, Pannonia and Britain, Colonies for some Centuries, it is most likely, as has been before observed, that the Laws introduced by them became the municipal Laws of the several Countries, and were carried by these northern People wherever they settled

* See Montesquieu de l'Esprit des Loix, liv. xxviii, chap. 22.

afterwards

afterwards in their Migrations. — Among these Laws and Institutions, there is no Doubt but the Jury was one; and where shall we go with so much Propriety to look for its Origin as among those who, of all Mankind, were the Depositaries and Patrons of *equal Law and Liberty*, and which they themselves had learned from the Wisdom and good Government established in Athens by Solon? For nothing can be so absurd as to imagine, that such a noble political Structure as had distinguished the two only civilized Nations of Europe, and whose legal Limitations of Power and Obedience had done Honour even to human Nature, should in Times future be the fortuitous Result of a tumultuous Deliberation, and that of Scythians and Barbarians, rather than an Imitation of the Wisdom of those Customs, which had been introduced amongst them by their Conquerors.

We do not find any Mention made of a Jury in England till the Time of Alfred, or rather his Brother and Predecessor Ethelred; for I am inclined to think the Law mentioned by Lambart belongs rather to Ethelred the First than the Second. Selden, *Analect. lib. ii. c. 6.* speaking of this Law, says, *Duodecimviris judicii antiquissima hic habemus vestigia, that here we have the most antient Account of a Jury.* — In the Original it runs thus. — *In singulis centuriis comitia sunt, atque liberæ conditionis viri duodeni ætate superiores, una cum præposito sacra tenentes jurant se adeo virum aliquem innocentem haud damnaturos sententive absoluturos.* — In every Hundred let there be a Court, and twelve Men of free Condition and competent Age chuse, who, with a Foreman, shall swear that they will condemn the Guilty, and acquit the Innocent. Upon which we may observe, that Bacon,

in his Discourse, &c. c. 38. * renders *una cum præposito*, — together with the Lord of the Hundred, whereas *Præpositus* here signifies the Foreman of the Jury, in the same Sense as it has been retained ever since; and by thus making him a Part of the Jury and not the Judge of the Court, the Number would consist of thirteen, *duodecim cum præposito*, twelve with a Foreman, which made an odd Number, and was of the Essence of a Jury before Alfred, for the Reasons above observed, relating to the Number of the *δικασται* of the Greeks, and the *Judices* of the Romans, p. 29, 117.

By the Placing of this Law in the *Analecta* of Selden before-mentioned, i. e. after those of Alfred, Edward, and Edmund, it should seem that Selden supposed it to belong to Ethelred the Second; whereas, if it is the most antient Account, the *antiquissima vestigia* of a Jury amongst us, it must relate to the Times of Ethelred the First, who was prior to Alfred, in whose Code of Laws there is one expressly appointing a Jury of twelve. — Bacon, in his Discourse of Government before mentioned, places the Time of Ethelred, A. D. 675. which Date can agree with no other of that Name than Ethelred King of Mercia; but it cannot be supposed that a Business of such Consequence, as was the introducing such an Institution, could be the Work of a petty Prince, but rather of an English Monarch, with Design to make a Rule for a whole Kingdom rather than a small Province. As therefore the Introduction of a Jury into the Polity of this Country does not agree with the Times of Ethelred (according to Bacon) King of Mercia, nor Ethelred the Second, King of England, according to the placing of his Laws in

* Bacon's Discourse on the Laws and Government of England. Tit. Saxons, c. 38.

the *Analecta* of Selden, we may with more Propriety conclude, that this Ethelred was the Brother and Predecessor of Alfred.

The first Time we hear of a Jury in the northern Nations, was in the Reign of Regner Lodbrog, King of Denmark, about 820. — Soon after this Time, about 842, we find among the Laws of Keneth Mac Alpin, King of Scotland, one relative to Juries, which stands thus, — *Capitalium insimulatos septem spectata fide viri, aut novem, undecim, tredecim, quindecim aut numero majori modo is impar fuerit, ex sententia judicanto* *. Upon which we may observe, first of all, that the Jury in Scotland was to consist of seven, nine, eleven, thirteen, fifteen, or any unequal Number; by which it appears, that it was not confined to any precise Number, but any Inequality from seven; in the next Place, it is very remarkable, that they are required to find their Verdict in the very Terms of the Roman Law to the same Purpose — *ex sententia judicanto* — to the best of their Judgment; or, as the Roman Law expressed it, *ex animi sui sententia*. Hence one would be inclined to think that the Scotch Law had a View to the Roman *Formula*, and was an Imitation of their Jury in a criminal Process.

About the same Period we find mention of a Jury and Compurgators in Wales, where the *lesser* Jury were to be *unanimous*, and the *greater* or *grand* Jury were to decide by Majority. I know it is the Opinion of some learned Men, that these *Compurgators* were of the same Nature as *our* Jury, or that at least our Jury was formed upon the antient Use of Compurgators; — but I am rather inclined to think that the Compurgators were an Imitation of the *Laudatores* among

* Vid. Boxhornii Hist. Universal. sub Anno 842.

the Romans, which were to be ten in Number, and their Business to speak to the Character of the Criminal; *Uti in Judiciis qui decem laudatores dare non potest, honestius est ei nullum dare, quam illum quasi legitimum numerum consuetudinis non implere.* — As in capital Trials, if a Man cannot produce ten Laudatores to speak to his Character, it would be better to call never a one than not to produce the whole Number required by Law, says Cicero *. Here we see the Custom of bringing Laudatores, i. e. Men of Reputation to speak to the Character of the Criminal, in the same Manner as Compurgators were formerly used among the Britons, and are at this Day in the Corporation of London, upon the Occasion of a Citizen's Qualification for serving the Office of Sheriff; which he is not obliged to serve if he can bring a certain Number of Compurgators, the Word still used, to swear they believe what he declares upon Oath, that he is not worth the Sum required by Law for the Execution of the Office †. Hence we see that the Laudatores among the Romans were a different set of People from the Judices or Jury; so likewise the Compurgators differed in their Office from the Jury of the British and Saxon Times; — so that it is a Mistake to reckon upon the Compurgators as a Jury, or even the Foundation of the Institution among the Britons, since we have seen the Difference and Distinction there was between them, even the same as there was between the Laudatores and Judices in the Roman criminal Process. And as we have seen out of Cicero, that the Laudatores were to give the Character before the Jury, in Judiciis, so were the Compurgators to give their Testimony before the Jury — which plainly shews their Duty was distinct.

* Cicero Verin. 5.

† This negative Proof was in Use among the Allemans, Bavarians, Thuringians, Frisons, Saxons, Lombards, and Burgundians; — but not among the Salian Franks. Vid. Legg. Ripuar. Tit. 11, 12, 13.

Here again we may observe, that the Admission of *Compurgators* among the Britons and Saxons was a direct Imitation of the Roman *Laudatores*; and if this Roman forensic Custom was retained in Britain, why may we not admit that our *Juries* were Remains of the Roman *Judicia*?

If it be asked, If the Jury was a Remain of the Roman Institution or Trial by *Judices*, how comes it to pass that we meet with no mention of it in this Island before Keneth in Scotland, and Ethelred in England? — The Answer seems to be, — That the Time between the Departure of the Romans and this Period was taken up in Wars and civil Diffentions between the Britons and Saxons; that they had no Time to take any Measure for establishing any civil Polity or Plan of Government; — and soon as they began to be reconciled to each other, and Egbert was admitted as King of England, the Danes caused great Disturbance and Devastation, so as to prevent any Attention to any such Regulations as are the Fruits of Peace and the Productions of Tranquillity. — After some fifty Years of Danish Invasion, and all the Evils consequent upon it, it was reserved for Alfred, a sensible, wise and learned Prince for that Time, to collect all the Materials of past Reigns, and dispose them into the best Form that was consistent with the Unhappiness of the Times, and out of several broken Pieces to form one Body of Law, upon Principles of Justice and Equity, — making such salutary Additions as were suitable to their present Circumstances.

When Ethelred, whoever he was, appointed the Jury to be twelve, *cum præposito* or *Foreman*, we may suppose it was an Improvement upon the Custom of having the Jury consist of a greater Number, provided there was an odd one, as we have seen above, in the Scotch Law of Keneth, where the *aut numero majori modo* is

impar fuerit, implies it was not confined to any particular Number, but a Jury at large. Bacon says, c. 28. *In former Times questionless the Trial among the Saxons was in a confused Manner, by Votes of the whole Multitude; but Time taught them better Advice, to bring the Voters to a certain Number, according to the Grecian Way, who determined Causes by thirty-four, or the Major Part. But how they came to be reduced to twelve, I cannot conjecture.* Here we see he had a confused Notion of a Jury among the Greeks, which from the Authority of his Author, Emmius, he fixes at thirty-four; — but this is a Mistake, for we have before seen, that it consisted of an odd Number; and as to the Trial being by the whole Multitude, the Inconvenience, not to say Impossibility, of taking the Voices of *such* a large Number of People as may be supposed to attend on such an Occasion, is a sufficient Argument against the Practice, unless we may admit the Manner of Election by holding up the Hand, or *χειροτονία*, which was one Way of chusing among the Greeks, and seems to be that Method of Election among the antient Germans, which Tacitus describes to be *clamore non calculis*.

The Truth, however, seems to be this: — The Jury among the Saxons, in Imitation of the Roman *Judicia*, consisted at first, probably, of a greater Number than afterwards; but the Attendance perhaps of eighty-one being inconvenient to Men whose Labour was their Maintenance, they became changed for a lesser Number. In Scotland, by the Laws of Keneth, they were reduced, as we have seen, to seven, nine, eleven, thirteen, fifteen, or a greater Number, provided it was an odd one. — By the Law of Ethelred, they were confined to twelve, with a Foreman, viz. thirteen; and by Alfred to twelve absolute, without an odd Man. We shall see anon the Reason for this Change of thirteen for twelve, which Bacon owns he could not conjecture.

Among

Among other wholesome and beneficial Regulations, Alfred is said to be the first that instituted a Jury amongst us of twelve Men; by which many understand him to be the first Introducer of a Jury*; not as confining the Institution to the Number twelve, but supposing him to be the *first Inventor* of a Jury in general. — We have before seen, that the Greeks had a Number of Men called Δικασται, who were annually chose to hear and determine upon criminal Causes; these were either five hundred, one thousand, or fifteen hundred, but always with one added to make an odd Number, because if the Criminal had an Equality for him he was acquitted, as we have seen above out of Ulpian, p. 29. The *Judices* among the Romans, whose Office was the same with that of the Δικασται of the Greeks, were likewise of an odd Number. See p. 114. So was the Scotch Jury instituted by Keneth, so was that of Ethelred; from whence we may observe, that wherever this Institution was admitted, either among the Greeks or Romans, the Scotch or the English Saxons, — it being founded in the same Principles, and calculated for the same Purposes of Liberty and Protection, from the undue Exertions of Power and Oppression, notwithstanding some Variations, owing to the Difference of the Constitution of each Country, yet it was the same in that Point of the odd Number, as the determining Vote. — But when Alfred came to the Government, being a Man of Sense and Religion, he saw with Concern that the Life of Man was too much exposed to be determined by an odd Voice; for suppose the Jury to be thirteen, and six were satisfied of his Innocence, it would be hard Justice for the Criminal to lose his Life by an odd

* Qua lege nimirum, causæ omnes duodecim ejusdem ordinis cum reo viris, cognoscendæ permittantur, hæc inquam lex, hic primitus instituta est. Alfredi Vita a Spelmano, lib. ii. § 13.

Voice, (perhaps under the Guidance of Misapprehension, or the Influence of some corrupt Partiality) where his Innocence would appear beyond all Doubt to six *sworn Men* out of the thirteen; — he therefore altered the Number of the Jury from thirteen to twelve, and no Man was to be punished by Loss of Life or Limb, whose Crime or Misdemeanor was not *so evident* as indisputably to appear to all the twelve. This was an high Instance of Goodness of Heart in that Prince, and an Alteration in Favour of Mercy and Humanity. — I was glad to find this Conjecture of my own supported by the respectable Opinion of the learned Author of the Observations on the Statutes.

The Reason that induces me to believe that this Alteration of the Jury from an odd Number to twelve was made by Alfred, is, that Ethelred (perhaps his Brother and Predecessor) had settled it to be twelve, *cum præposito*, or Foreman, which made thirteen, — which being attended with Inconvenience in Alfred's Opinion, as is before observed, was the Reason of making the Alteration. — We may observe, that the Jury consisted only of twelve in Alfred's Time, from an Account of his Acts and Judgments on the Conduct of his corrupt Judges, supposed to be written by himself, and quoted in his Life by J. Spelman, lib. ii. p. 83. folio. where Alfred is said to order Cadwine, one of the Judges, to be hanged, because, when three out of the Jury of twelve would not find one *Hackwy* guilty, he changed those three for three others, who joined with the nine to condemn him. The words are these; — *Il pendist Cadwine pur ceo que il jugeast Hackwy a la mort sans l'assent des tous les Jurors en cas ou il soy etoiet mise en la Juree de 12 homes; et pur ceo que le trois le voilent salver, encontre les neuf, c'y remova Cadwine les trois pour les*

*les autres en queux cest Hackwy ne se mist nient ; — that is, He banged Cadwine, for that he judged Hackwy to Death without the Assent of all the Jurors, where he had put himself upon a Jury of twelve Men; and because three of the twelve were inclined to save Hackwy against the other nine, Cadwine put other three in their place, when Hackwy had not consented to what was done, nor put himself upon the Jury thus altered. From whence we may observe, that the Jury was then to be twelve precisely, whereas in the Reign before it consisted of thirteen. Alfred therefore was the king that made this salutary Alteration; and when he is supposed by Authors to be the first Institutor of a Jury, it is to be understood that he was the first that reduced it to twelve, having been always before of an odd Number; and that their Verdict should be unanimous, instead of being decided by an odd Vote. This Unanimity required by Alfred in all Verdicts, appears from the Words — *sans l'assent des toutes les Jurors, without the Assent of all the Jury*; the Neglect of which Part of the Law was the Crime for which he hanged Cadwine. — We may hence likewise explain another Passage out of the same Book, where mention is made of forty-four Judges being put to Death for male Practices on the Bench*; among whom one was Freberne; *par ceo que il jugea Harpin a la mort, ou les Jurors furent en doubtes de leur verdict; car en doutes doit l'un eins ceo, salver que damner. He banged Frebern, because he condemned Harpin to Death when the Jurors were in Doubt in their Verdict; — for where there is a Doubt, there they should acquit rather than condemn.* This Punishment of Freberne seems to have been occasioned by the Condemnation of Harpin, according to the old Custom of Majority, and not according to the new Regulation*

* Le Roy Alfred fit pendre 44 justices en un an, tant come homicides, par leur faux Jugemens. Spel. Vit. Alfredi, p. 83. lib. ii.

that required Unanimity and Consent of the whole Jury. The *Doubt* here mentioned implied the Disagreement of the Jury in the Case of Harpin, whereas they ought to be unanimous: — Notwithstanding which, the Judge condemned him. It was necessary therefore for the King to punish this Man with Severity, in order to assert the Authority of his *new Law*, and to shew, that their Attachment to the old Custom, in contempt and disrespect of the new Establishment, should not pass with Impunity. — After this View of the Corruption of the Judges in former Ages, when forty-four were executed in one Year, we cannot but feel the highest Satisfaction, and felicitate our Country on seeing the Courts of Judicature at present filled with such respectable Characters as are distinguished for Ability, Candour, and Integrity; — in the Exercise of which they reflect Honour on their Appointment, acquire Reverence and Esteem to themselves, and administer Justice and Security to their Country.

————— *quales neque candidiores*

Terra tulit —————

Hor. lib. i. Sat. 5.

This Account, by the Way, will resolve the Question that stuck with Bacon, c. 38, how the *Number came to be reduced to twelve*; seeing they were before of a larger and unequal Number. We may likewise take notice of a Mistake in the foregoing Paragraph in Bacon, that our Jury was from the whole Multitude reduced to a set Number, according to the Grecian Way, who determined Controversies by the Suffrages of thirty-four; wherein he was deceived by his Author *Emmius*, for it does not appear in any Greek Writer that they used any such Number of *δικασται* or Jurymen; the several Numbers of which the Grecian Jury or *δικασται* was occasionally composed,

composed, are to be seen above, p. 29. — Upon the whole, however, we may conclude that the Reduction of the Jury to twelve was by the Authority of Alfred, for the Reason above mentioned, whereas all Trials *before* were determined by an odd Voice, of which the Jury consisted. — It was the Opinion also of Bacon, that *this Jury sat in the most eminent Place of the Court with the Sheriff and Bishop as Co-assessors, &c.* But this Mistake arose, I suppose, from their being called the *Affisa*, which implied their *sitting*, not with the Presidents of the Court, but in an inferior Place. — Thus the Greek Jury or *Δικασται* were called *καθήμενοι*, *sedentes*, or Jury that *sat upon such a Cause*, as we now say; of which see p. 44. And the Romans, speaking of the *Judices*, used the Word *Considere*, and *Consurgere*, to sit in Judgment, and *rise up* to go to Consultation; of which see p. 130. In like manner, the English Jury before the Conquest *sat*, not as *Judges* with the Presidents of the Bench, but as Enquirers into the Truth of the Fact, and declaring its Rectitude or Obliquity according to Law; — which when they had done, the Sheriff or Bishop published the Penalty affixed to that Breach of the Law, or discharged the Prisoner.

This Method of Proceeding was an exact Imitation of the Romans, among whom the Jury tried the Cause, and he that presided or was Judge declared the Issue. At the End of the Oration *pro Archia Poeta*, Cicero addresses the Jury by saying, *he hoped what he had offered would be well received by them, as he was assured it would be by the Judge that presided; — ea, judices, a vobis, spero esse in bonam partem accepta, ab eo qui judicium exercet, scio.* Where we may observe a very evident Distinction between the *judices* and him *qui judicium exercet*. Therefore the *judices* were not *qui judicium exerce-*

bant,—those that presided in the Cause—but those *qui sententiam ferrent*, who gave the Verdict, and *qui judicium exercebat*, *pronunciabat*, he who presided, pronounced or declared it, and the Penalty or Acquittal in Consequence of it;—so that this *pronunciatio* was the final Act of the presiding Magistrate, *pronunciatio non dum condemnata*. Cic. pro Cluentio. — The Distinction between the Office and Duty of the *Judex* or Jury Men, and the *Prætor* or Judge, is no where more expressly declared, than where Cicero, speaking of himself, says, *that he had gone through all judicial Offices*, *Accusavi*, says he, *de pecuniis repetundis*—*Judex sedi*, *prætor quæsi*—*Pro Rabirio*. I have been the Accuser in Causes of Extortion and Rapine; I have likewise sat as a Jurymen, and presided as *Prætor* or Judge. — Here we may observe, that it was the *Prætor* or his Deputy, the *Quæstor* or *Judex Quæstionis*, that presided as Judge in criminal Causes, and the *Judex qui sedet* was the Jurymen who sat, as we say, upon the Cause. — We may hence likewise observe, that *sitting* was a Circumstance usually joined with the Mention of the *Judices*, as an essential Designation. — So Cicero, instead of saying *Judex fui*, says *Judex sedi*; and when a *Judex* or Jury Man was legally chosen, according to the usual Forms, he was said *ex lege sedere*. Cic. pro Cluentio. In Imitation of this Practice and Way of speaking, the English Jury was called *Affisa*, not as *Assessors* with the Sheriff and Bishop, but as sitting in an inferior Place, and in an inferior Capacity; in Imitation of the Romans, among whom they were called *Sedentes*, and among the Greeks *καθήμενοι*.

There is another Passage at the End of the Oration of Cicero pro Plancio, which fully declares the Difference between the *Judices* and the *Prætor* or *Quæstor*, i. e. the *presiding Magistrate*. — After

imploring

implores the Lenity of the *Judices* or Jury in Favour of his Client Plancius, — by all the Motives that Gratitude or Compassion could suggest, he turns to the Magistrate on the Bench, — *Tegue C. Flavi; oro et Obtestor ut mihi per hos conserves eum per quem, me tibi et his conservatum vides.* — And you, C. Flavius, I pray and beseech, that you, per hos, by Means of their Verdict, will preserve Plancius to me, who saved me to you and the Public. — It hence appears most evidently that the *Judices* were not Judges of the Bench, but an Institution answering the same Purposes with our Jury.

In the Danish Laws the Jury were called *sande menn*, i. e. *virī veraces*, wise Men and true; whence we may perhaps explain what is meant in 3 H. 7. c. 14. by *twelve sad Men and discreet*; which Word *sad* I suppose was a Corruption of the *sande menn* of the Danes. In the Decision between Lord Dacre and the Abbot of Croyland, contained in the Continuation of the History of Croyland, Edit. Gale. sub an. 1449. there is mention of *Communication had with wise, sadde and learned Men in the Law*; where *sadde*, I suppose means *able*, in the same Sense as we see it joined above in the Act of Hen. 7. with *discreet*. Now in our Language, the Word *sad* is used in many Acceptations, and sometimes in a bad Sense; as when we say, a *sad Man*, or *sad Fellow*; and as the Jury were described in the Act of the 3d of Hen. 7. as *sad Men*, perhaps Polydore Virgil (who came to England in this Reign) might hence call our Jury *illud terribile duodecim virorum Judicium* — lib. 9. Hist. Angl. — misunderstanding the Words *sad Men* in the Statute, to signify the Verdict of twelve profligate and corrupt Men. — This is offered only as a Conjecture, in order to assign some kind of Reason for the extraordinary Description of our Jury given by that Historian, and which perhaps may

occasion the Reader to enquire after a better; — for it is really difficult to conceive what Inducement he could have to call the most humane Institution, calculated for all the Purposes of Protection and Liberty, by so harsh a Name, as the *terrible Judgment of twelve Men*.

But to return to our Argument. — It does not seem at all probable that the northern Nations had learned the Institution of a Jury, which they are supposed to have brought over here, either from the Asiatic Goths and Wodin, or the Grecian Soldiers of Alexander, or any other Migrations from that Quarter; seeing we read not in antient History of any such Settlements in the North from Greece upon any Occasion; on the contrary, we find sufficient Employment for them at home, when the several Captains of Alexander sat up for themselves, and divided the great Empire which their Master had acquired into separate and independent Kingdoms; the Attachment of the Soldiers to their several Leaders engaged them in their respective Service, so that there is hardly any Probability that they separated from their Comrades to seek new Settlements in the northern Climates, when they had the most beautiful and fertile Provinces of Asia and Egypt offering themselves to their Culture, and soliciting their Acceptance.

But if we turn our Inquiry on the side of the Romans, we shall perhaps find, that as they carried their Laws and Institutions wherever they did their Conquests, and settled their Colonies, so the Practice of *Juries*, together with other Customs which appeared under the *feudal Tenure*, was copied from the Romans, and what was discoverable in that Shape in the North and other more southern Provinces.

Provinces of the Roman Empire, were no more than a Remain of the Mode of judicial Process brought from Rome, and in Use in their Colonies.

When therefore the Saxons and northern Settlers came into this Country, they might find here the same judicial Customs and Usages that they had been used to in their own;—for the Romans got into Germany at the Time of Julius Cæsar; and towards the latter End of Augustus, the Defeat of *Quintilius Varus* (which happened in or near the Country of the *Cherusci*, which was divided only by the Elb from the Angli, and was itself a Part of Saxony) shews how far the Roman Arms had penetrated into that Country; and we learn from Paterculus, Hist. Rom. lib. ii. c. 118. that the Laws and Jurisprudence of Rome followed their Arms thither at that Time; for he says, that it was owing to *Quintilius Varus* his Indolence in Military, and Attention to forensic Affairs, that he suffered himself to be surprised; for *he thought that People, who seemed to have very little human about them but their Form and Voice, could be easier managed by Laws and a good Police than subdued by Arms; which the People perceiving, artfully pretended to felicitate themselves on being so fortunate as to have the Benefit of the Roman Jurisprudence to terminate their Differences, which before used to be determined by the Sword;—so that Quintilius, deceived by these Artifices, used to sit in Judgment in the midst of Germany, surrounded with Enemies, with as much Security as if he had been presiding like the Prætor in the Forum at Rome. This Inattention the Germans, watching their Opportunity, soon laid hold of, and falling upon him and his Army unexpectedly, totally destroyed them* *. From hence we may observe, that

— * *Is (Quintilius) cum exercitui qui erat in Germania, præesset, concepit esse homines qui nihil præter vocem membraque haberent hominum, qui gladiis domari non*

that Varus sat in Judgment in Germany among the Cherusci in the same Manner, and with the same Forms and Methods of Judicature, as if he had been *Prætor at Rome*. And as the *Judicia or Trial by Jury* was the common Practice in the *Prætor's Court*, we may fairly conclude, that the same Forms of Judicature were used at the German Tribunal, as were practised at the *Prætor's at Rome*. And thus much may be collected from the Expressions of *Jurisdictionibus agendoq; pro tribunali ordine*, applied by Paterculus to this Court of *Quintilius Varus*.

We have here the most undoubted Proof of the Laws and Customs of Rome, being used in or near Saxony at the Time of Augustus, that is, when *Quintilius Varus* commanded the Army in Germany.—Among the many Forms of Process used in his Court, we may fairly place the *Judicia or Judicature by Jury*, seeing he tried Causes like the *Prætor at Rome*, *se prætorem urbanum in foro jus dicere crederet*; and the Manner the *Prætor* tried Causes was *Judicibus*, by a Jury.—If we can get this once admitted, and the Roman Judicial Terms upon this Occasion introduced into Germany, we may have good Reason to believe, that an Institution (which they owned the Benefit of, because it ended Differences by mild Decisions, which before were used to be determined by the

non poterant, posse jure mulceri; quo proposito mediam ingressus Germaniam velut inter viros pacis gaudentes, dulcedine, jurisdictionibus agendoque pro tribunali ordine traherat æstiva at illi simulantes fictas litium series, et nunc provocantes alter alterum injuria, nunc agentes gratias quod lites Romana justitia finiret, feritasque sua novitate incognitæ disciplinæ mitesceret, et solita armis discerni, jure terminarentur—in summam socordiam perduxere *Quintilium*, usque eo ut se *prætorem urbanum in foro jus dicere*, non in mediis Germaniæ finibus exercitui præesse crederet.—Vell. Patercul. Hist. Rom. lib. ii. c. 118.

Sword)

Sword *) maintained its Ground by its *Utility*, and though introduced by a Conqueror, yet was of too great Importance to be rejected, whenever they threw off the Yoke; thus it might be retained, after the Defeat of Varus, and made a Part of their Polity, when they had driven back the Masters from whom they had learnt it. We may hence figure to ourselves the Channel by which, and other like Means, the Use of a *Jury* got into Germany by the Romans, and which seems to be much more probable and direct than either by the *Asiatic Goths*, *the Soldiers of Alexander*, or *the Neighbourhood of Greece*.

We have abundant Reason to think, that the *Jury*, as practised by the northern Nations, was learnt from the Romans, as well as many other Usages and Customs which we find amongst them; particularly that Connexion between the Lord and his Tenant, by which the last was engaged by the feudal Law, to *pay his Lord's Debts*, *ransom his Person taken in War*, and *portion his eldest Daughter*; which were chiefly the Cases in which the Client was obliged to assist his Patron by the Roman Law, as hath been observed above, p. 78. And Bacon in his Discourse of the Laws and Government of England observes, that the Aids in these three Cases were due by the common Law of the Britons, Romans, and Saxons, p. 161, Note.—If so, whence could this common Law of the Britons and Saxons take its Rise, but from the Use of it among the Romans in

* *Agentes gratias quod lites Romana justitia finiret feritasque sua novitate incognitæ disciplinæ miteretur, et solita armis discerni, jure terminarentur. Paternus. supra.* — N. B. The malignant Turn given this by Montesquieu, de l'Esprit des Loix, liv. xi. c. 19. Note. (b) is very remarkable; he insinuates that it was the *corrupt judgments, les calomnies des jugemens* of the Court of Varus, that caused the Germans to revolt; — but with what Truth, compare it with the Passage of Paternus.

Britain and Saxony? If therefore we see in this Case a fundamental Law of the Saxons derived from a Roman Custom, why may we not suppose, with equal Probability, that they retained many other Usages and Institutions from the Romans, who lived among them, especially this of a *Jury*, in Imitation of the Roman *Judicium*, with which it perfectly agrees in the first Principle, and all essential Points?

Among many other Instances of the Customs and Terms of the Roman Jurisprudence to be found in the Practice of our Law, there is one very remarkable relating to a *Thief taken in the Fact*. This the Athenians called *ἐπ' αὐτοφωρῶ*, carrying the Theft about or upon him; *ἐπ' αὐτοφωρῶ κλεπταί*. Æschin. c. Ctesiphon. § 5. And Lyfias in Eratosthenis Cæde, uses the Word *ἐπ' αὐτοφωρῶ* for being taken in the Fact of Adultery. — In this same Sense of being taken in the Fact, the Romans used the Expression, *manifesto deprehensus*. — Cic. pro Cluentio — et pro Cælio. The Word *Manifesto* seems to be formed of *manu*. Hence the Saxons expressed this Idea by Words of the same Import; *band-babend*, having in the Hand, or *back-berend*, bearing on the Back. — The Welsh Laws of Hoel-dda, used in the same Sense the Words *lledrad un y llaw* — *latrocinium vel furtum in manu*, the Theft in his Hand. The English Law calls it *taken with the Manner*, instead of the *mainer*, from *main*, the Hand, in the French Language, in which our Statute Laws were written from Westminst. primer 3 Edw. I. to Rich. III. In Westminst. primer, c. 15. it is called *prise ove le mainer*. In Rot. Parliament. 5 Rich. II. Tit. 96. Cotton's Abridgment, and Coke's Institutes, it is corruptly called, *taken with the Manner*; and the English Translators of the Bible, following the vulgar Jargon of the Law, rendered

dered Numbers v. 13. relating to a Woman taken in the Fact of Adultery, by *taken with the Manner* *, in the same Sense as Lyfias above uses *παυροφυω*; which in its original Signification related to *being taken in the Fact of Theft*, but by a more general Application, it was used to imply, *being taken in any Fact*. In the Scotch Law, it is called *taken with the Fang*. See Reg. Majest. lib. iv. c. 21. And in Cases of Murder manifest, the Murderer was said to be *taken with red Hand and hot Blude*. See Sheriff's Air, Tit. 11. All which Modes of Expression in the Western Empire took their Origin from the Roman *manifesto deprehensus*. — And it is remarkable, that this Circumstance of *the Hand* is retained in the Phrase used upon this Occasion, in all Parts of the Western Empire; from whence we may draw this Conclusion, that this forensic Mode of Expression was a Remain of the Roman Jurisprudence, in which *manifesto deprehensus* was no other than *manu deprehensus*; and thence propagated by their Colonies, with their Law and other Institutions; through their Conquests. The Word *manifestum* seems to me to be compounded of *manu fixum*, — *fixed in the Hand*, in the same Sense as *hand-habend* of the Saxons; from *fixum* the Germans made their *vist*, and the English *fast*, in the same Signification. — Hence the Gothic Word to *invest*, is properly to *infest*, *infestan* *vestan*, to *make fast or confirm* a Person in the Possession of any Title, Honour or Property. And as the Ceremony of *Investiture* was merely Gothic, not by delivery of a Robe, *veste*, which is the general Opinion of the Origin of the Word, but any other thing, as a Sword, Javelin, &c. so we may well suppose, that the Word was Gothic likewise, and was formed from the Gothic or German, *vesten* *investen*, to *make fast or confirm*. Grotius de imperio Summar. Potestatum circa Sacra, c. 10. says, — *Vestire et investire*,

* נרפשה — deprehensa.

sunt vetera vocabula originis Germanicæ, quæ juris qualiscunque collationem significant — ideo apud veteres auctores officiis omnibus tum civilibus, tum ecclesiasticis aptata reperiuntur: — That vestire and investire are of German Origin, and signify a Confirmation of Rights, and therefore are used as well in ecclesiastical as civil Affairs.

This Departure from the usual Etymology, *veste*, to the Gothic *vesten* or *festen*, to make fast or confirm, perhaps may require a good Authority; and therefore the Reader is referred to Hottoman de verbis feudalibus, and Loccenius on the same Subject, at the End of Brissonius de Verborum Significatione.

Montesquieu, liv. 29. c. 13. makes no Doubt but that the Difference among the Romans in the Punishment of *furtum manifestum et nec manifestum*, which in the first Case was *quadruple* the Value of the *thing stole*, but in the last Case only *double*, and whence came the Distinction of *taken in the Fact* or *not taken in the Fact*, was a Remain of the Lacedemonian Law of Lycurgus, which encouraged *theft* only to accustom the Youth to Art and Adroitness, but punished them if they were discovered. — But this is too refined; the Reason is plain and obvious: — A Thief *taken in the Fact* could have no Plea nor Excuse; the Fact was undeniable; whereas in the Case of a Thief *only suspected*, many Circumstances might contribute to render the Matter dubious, and therefore the Punishment was less in Proportion to the Uncertainty of the Crime.

When therefore the Saxons came to Britain, they probably met with the same Vestiges and Remains of the Roman Jurisprudence that they had been used to in their own Country; for we must remember what we have seen out of Cæsar, Suetonius, and Aulus Gellius,

Gellius, at the Beginning of this Third Part, that the very Effence of a Roman Province consisted *in using all the Roman Laws and Institutions, instead of their own, jura et instituta omnia Pop. Romani non sui arbitrii habent*, as Aulus Gellius saith, lib. xvi. c. 13. And we have above seen, that Britain was a Roman Province, and that it contained four Colonies, consequently those Colonies used *omnia jura et instituta P. Romani*, all the Laws and Institutions of the Roman People; and amongst those all we may reckon the *Judicatory* or *Jury*, as one. We have also seen out of Tacitus, Annal. 12. that one of the chief Reasons of Ostorius's drawing out the Garrison of Camalodunum was not only to *quell the Rebels*, but *imbuendis obeis ad officia legum*; to accustom the subjected Britons to the Use of the Roman Laws, which they were to live under. And under the Government of Agricola, we find the British Youth (who at first had an Abhorrence of the very Language of their Masters) came by Degrees to imitate their Eloquence, and make a Figure at the Bar. Tacit. Vit. Agricolaë. From all which it appears, that all the general Roman Laws and Institutions were used in the Province of Britain; and if *all the Laws and Institutions, omnia jura et instituta*, then beyond all Doubt this Institution of *Trial by Jury*, called *Judicium*, was one.

But let us go one Step farther, and consider the Lines of family Likeness discoverable in the English Jury and the Roman *Judicia*. This Resemblance between the old Gothic Customs in France, and those of Rome under the Commonwealth, particularly with regard to the Manner of giving Judgment in the Court of Homagers or Peers, struck Montesquieu so strong, that he could not help saying, *Je sai bien que les tribunaux François des hommes ou des Pairs, le jugement sans appel a un autre tribunal, la maniere de prononcer, Je condamne, ou je absous, avoient de la conformite avec les jugemens po-*

pulaires des Romains.—I well know that the French Tribunals of the Jury of Homagers, or Peers—The Judgment without Appeal, and the Manner of giving it in these Words, *I condemn, or I absolve*, had great Conformity with the Judgments given by the Romans under the Commonwealth; among whom it was a Custom that the Judices or Jury gave Sentence of Absolution by a Pellet marked *A*, for *I absolve*; or of Condemnation, by one marked *C*, for *I condemn*; as mentioned above, p. 128. Vid. *L'Esprit des Loix*, tom. iii. chap. 39. liv. 28.—And liv. 30. chap. 11. he saith, *Dans le commencement de la premiere (Race) il y avoit dans les villes (des Franks) a peu pres la meme administration que chez les Romains; les corps de Bourgeoisie, un Senat, des cours de Judicature.*—In the beginning of the first Race (of Franks) there was in their Towns near the same Administration as among the Romans; the Commons, a Senate, and Court of Judicature.—All which shews that the Roman Jurisprudence, the Courts of Judicature, and the Forms of criminal Process, were in use in France under the first Race of the Franks:—So that under the Conduct of this Authority we may venture to compare likewise some Circumstances attending the English Jury, with some Formalities attending the popular Judgments among the Romans. And first, in the criminal Process in the Prætor's Court, the *Accuser* and *Criminal* were allowed each to except against fifteen, viz. five out of each Order, of the Senators, Knights or Gentry, and *tribuni aerarii*, or lower Class of the People; out of which three Orders the Judices or Jury was to be chosen by the *Lex Plautia*. This Exception was called *Rejection Judicum*, or in our Language, the *Challenge of the Jury*; of which see above, p. 114, 115. This *Rejection* extended to such Persons as either Party had Reason to suspect might be influenced in their Verdict, by Favour, Affection, Consanguinity, Malice, or any other Passion that might lead to Partiality or corrupt Judgment.

After

After which Rejection of fifteen each, the remaining fifty-one gave the Verdict. Let us now place by the side of this Roman Custom the Method of Proceeding in the like Case, with regard to an English Jury, wherein each Party hath a Liberty of what is called in our Law a *Challenge*, viz. an Exception to a particular Number of Jurors; and as the Criminal hath a Right to *challenge* any Persons he may suspect of a Tendency to Partiality, so they that sue for the King may challenge Jurors likewise. Ordinan. for Inquests, 13 Edw. I. § 4.

This Circumstance of *rejecting* the *judices* among the Romans, and *challenging Jurors* by the English Law for one and the same Reason, viz. to prevent partial and corrupt Judgment as much as might be, is a strong Presumption that the English Jury copied it from the Roman Forms of Trial, and is a weighty Argument to prove that the *Roman Judicium*, and the English Trial by *Jury*, were in their Principle and essential Forms virtually the same.

Another Instance that leads to this Opinion is, that by the Roman Laws, the *criminal* or *accused Person* was allowed to plead a good Reputation, and permitted to produce Men of Credit to speak to his Character; — these were called *Laudatores*, or *Speakers in his Praise*; and by the Law were required in each Case to be *ten*. Hence Cicero, Verrin. 5. says, — *Ut in judiciis qui decem laudatores dare non potest, honestius est, ei nullum dare, quam illum quasi legitimum numerum consuetudinis non explere* — That upon a Trial where a Man cannot produce ten to speak to his Character, he had better bring none at all than fail in the Number prescribed by Law. Whence we see that ten *Laudatores* were admitted by the Roman Law to appear

appear to the Character of an accused Person, if he could find so many, and that their Testimony was often of Weight. Of this Custom there is frequent mention in Cicero's Pleadings. Pro-Cluentio, towards the End, he says,—*Honestissimos homines laudatores videtis*. And again, *homines honestissimos quos nossemus omnes, huc frequentes adesse, et hunc præsentis laudare, voluerunt*.—*These honest Men, whom we all know, and now see before us, were desirous not to give him a Character in Writing, but to appear before you in Person, to bear Testimony to his Worth*. There are several other Passages in Cicero which the Reader may consult, relative to this Purpose. By the Welch Laws of Hoel-dda, or *the Good*, we find this same Custom observed in Wales, where in Cases of Stealth the Criminal had the Benefit of producing twelve Men; the Half of whom were to be Men of Probity and Note, who upon Oath would testify they did not believe him guilty; in this Case he was acquitted. — From this Act of theirs, they were called in after Times in our Laws *Compurgators*.—The Words in L. L. Hoeli, run thus in the Translation — *Mos nunc est, ut ad omne furtum abnegandum 12 virorum adhibeatur juramentum, quorum pars dimidia erunt viri notabiles* — (*wyr nod, viri noti.*) lib. iii. c. 2. By the Words *wyr nod*, or *viri notabiles*, was signified in this Case Men of Reputation, who were of known Characters, whom the Public might confide in. — So in the same Sense Cicero pro Cælio uses the same Word, — *notis ac majoribus natu*; — and in the Quotation above out of Cicero pro Cluentio, we may observe the same Word made use of, — *honestissimos homines, quos nossemus*. It is to be observed, that the *Compurgators* among the Welsh consisted of twelve, whereas the *Laudatores* of the Romans were by Law required to be *ten* only. This Alteration in the Number makes no Difference in the Resemblance, for the Duty among the Romans and Welsh was exactly

the same; and we have seen above, p. 82. that this Custom of Compurgation, which was a kind of negative Proof, was used by the Saxons in their own Country, as appears from Loccenius, Baluze, and Lindenbrogue. Montesquieu in de l'Esprit des Loix observes, that among the Ripuarians, if any Man was accused, he could in most Cases clear himself, by the Oath of a certain Number of Persons, who were admitted to swear that he was not guilty. The Number of Witnesses were in Proportion to the Nature of the Case, and sometimes were increased to the Number of seventy-two. This Practice, he says, was to be found also in the Laws of the Germans, (*Allemands*) Bavarians, Thuringians, Frisians, Saxons, Lombards, and Burgundians *. As therefore it is most probable that these Nations of Barbarians retained this Custom or Law from the like Practice among the Romans, whose Colonies had lived among them, so it is with great Reason likewise to be presumed, that the *Compurgators* among the Welsh were only an Imitation of the *Laudatores* among the Romans, who possessed most Parts of Wales from the Time of Claudius to Honorius, upwards of three hundred Years, during which Time they had a Colony in their Neighbourhood at Deva or West-Chester, another at Glevum or Gloucester, on the Borders of Wales; a strong Garrison and Military Settlement at Isca Silurum, now Caerleon, in Monmouthshire, the Use of which, among other Reasons, might

* La Loi des Francs Ripuaires avoit tout un autre Esprit — Elle se contentoit des preuves negatives, et celui contre qui en formoit une demande ou une accusation, pouvoit dans la plupart de cas se justifier en jurant avec certain nombre des temoins qu'il n'avoit point fait, ce qu'on lui imputoit, le nombre des temoins qui devoit jurer augmentoit selon l'importance de la chose, il alloit quelquefois a soixante-douze. Les Loix des Allemands, des Bavares, des Thuringiens, celles des Frisians, des Saxons, des Lombards, et des Burguignons, furent faites sur le meme plan que celles des Ripuaires. L'Esprit des Loix, tom. iii. lib. 28. c. 13.

be imbuendis sociis ad officia legum—to accustom the People to the Laws of their Conquerors, as well as to keep them from Revolt; as Tacitus observes upon a like Occasion. From these Opportunities and Communications, the Welsh might learn the Practice and Use of the *Laudatores* in the Roman Jurisprudence, and retain them in their own Judicatories, after the Romans had left them, under the Name of *Compurgators* or *Reithwr*. See p. 81. But above all, there is a Circumstance relative to our *Jury*, which we find also attending the Roman *Judicia*, from whence we may draw a weighty Argument that our *Jury* was derived from thence, and that is, the Choice of the *Judices*, or *Jury*, out of the Vicinage or Neighbourhood.

In the Oration of Cicero for Cn. Plancius, who was accused by Laterensis of Bribery and Corruption of the *Voters of his Tribe*, in his Canvass for the *Ædileship*, the Charge was *Decuratio Tribulium*, packing that Part of the *Jury* which was to be taken out of his own Tribe*, *Descriptio Populi*, making a List of particular Persons, which in our Law is called *nomen eorum imbreviare*†, or *impaunelling* a

* It is to be observed, that the Roman *Jury* or *Judices*, by the *Lex Plautia*, was to be chose out of the three Orders or Ranks of Citizens, the Senators, Equites or Knights, and the Plebeians, fifteen out of each Tribe—Each Order or Rank of the People was called *Decuria*; hence we see what was meant by *Decuratio Tribulium*; it was packing so much of the *Jury* as was to be chose out of the Tribe Plancius belonged to.—Now this *Decuratio Tribulium*, or corrupting his own Tribe upon the *Jury*, could never be meant of *Judges* in the Sense we use that Word as *Presidents* of the Bench, because their Office and Choice was annual, whereas this *Decuratio Tribulium* was upon every Trial; it was an Allotment of so many out of every Tribe to try each Cause, as appears from this Charge against Plancius, for endeavouring to corrupt the *Judices* of his own Tribe, who were to sit on his Trial.

† Glanville de Legg. et Consuetudinibus Angliæ, lib. ii. c. 11.

*

Jury;

Jury; — which by the Romans was called also *album Judicum*; and the third was *suffragia largitione devincta*, *Votes engaged with Money*. All which Cicero calls upon *Laterensis*, the Accuser, to make good; — *Hæc doce, hæc profer, hæc incumbe, Laterensis, decuriasse Plancium, descripsisse, sequestrem fuisse, pronuntiasse, divisisse*. — He then goes on; *If these things were true*, says he, *I wonder Laterensis should object against a Jury out of the Tribe to which Plancius belongs, and which he is supposed to have attempted to corrupt, for then he could never have borne to have submitted himself to their Inquest; no, never could have the Impudence to look them in the Face after such an Insult upon their Virtue* — *Whereas by rejecting the Men of his Tribe from the Jury, who best could know the Truth of the Fact in Question, quorum in hujus delicto scientia certissima; what could you say for putting Men on the Pannel who knew nothing of the Matter, instead of those who, according to your own Confession, knew the whole Transaction, and therefore were properest from their own Knowledge to give a Verdict upon the Case, cur denique se divinare malueris, quam eos qui scirent judicare* *. Upon which we may make this Remark, that in the *Judicia* or Trials by *Judices* or Jury among the Romans, they were often guided in their *Verdict* by their own Knowledge of the *Fact*, where they had any, and were not absolutely confined to depend upon Evidence or Depositions of Witnesses, where they themselves, being of the Tribe or Vicinage, were supposed to have the most undoubted Knowledge of the most material Circumstances relating to it, which Cicero here calls the *scientia certissima*, *undoubted Knowledge*, whereby they were enabled to judge of the Case much better than Strangers; and therefore are here said to be such *qui scirent judicare*, who could

* Cic. pro Cn. Plancio.

give their Verdict upon *their own Knowledge*. — We have seen above, p. 47, &c. out of Demosthenes and Æschines, that the *δικασται*, or Jury among the Greeks, were called upon to have regard to what they were persuaded of from their own Knowledge, rather than any Testimony or Deposition of Witnesses; — and Æschines particularly addresses them to this Purpose, in the most express Terms; *There was no need, he said, in his Opinion, of Counsel or Witnesses in Matters which they themselves knew so well.*

There is likewise an Instance to this same Purpose in Cicero pro Flacco, where he addresses the Judges or Jury in Behalf of Flaccus, *desiring them to be guided in their Judgment by what they themselves know of him in every Part of Life, preferable to the Testimony of Timolites, a Person unknown to them, together with other corrupt Greek Evidence, who, according to the Custom of their Country, even to a Proverb, had no Regard to an Oath; shall Strangers, says he, teach you, who Flaccus is? You, who from your own Knowledge have seen him to be, modest in his Youth, upright in his Office; a gallant Soldier, and a prudent General, &c. You here present on the Jury, who know him to be, a wise Senator, an uncorrupt Prætor, and a worthy Citizen — Shall you, who ought to be Witnesses in this Case to others, be thought to stand in need yourselves of any Evidence whatever to direct your Verdict*?* Hence we may collect, that at the Roman Bar, as well as at Athens, the Judges of the one and the *Δικασται* of the other, were at Liberty to judge, i. e.

* Quibus igitur testibus ego hosce possum refutare nisi vobis? Vos docetis qualis sit L. Flaccus, &c. — quem vos modestissimum adolescentem quem vos præsentem constantissimum senatorem, &c. de quibus vos alii testes esse debetis, de iis ipsi alios testes audiat? Cic. pro Flacco.

to give a Verdict upon their own Knowledge of the Fact, before any Evidence or Testimony whatever.

Thus likewise in our Law, the Jury is to be chosen out of the *Vifne, de vicineto*, i. e. *Vicinage* or *Neighbourhood*, as it is called in the old Writ of Summons in Glanvil and the Registrum. The Reason for this Choice out of the Neighbourhood was the same as is hinted at by Cicero, relating to the *Decuriatio Tribulium*, the *Scientia certissima* by which *Scirent Judicare*; that Knowledge of the Fact in Question in the Neighbourhood, by which they were in all Probability better able than Strangers to judge from their own Knowledge of the Circumstances of the Case, and therefore the Reason for summoning the Jury *de vicineto*, out of the *Neighbourhood*, is mentioned in the Writ, *qui melius veritatem sciant, because of the Probability of their Knowledge of the Fact better than Strangers*. — And it is remarkable, that the same Circumstance observed by the Romans, with regard to the *Judices* being chose out of the same Tribe—the *certissima scientia tribulium, qui scirent judicare*—is retained also in our Law of Juries, who are to be chose out of the *Vicinage*—*qui melius veritatem sciant*, as the Writ says, because they are better able to know the Truth of the Case. From this Resemblance in the Manner of chusing the Roman and English Jury out of the Neighbourhood where the Fact in Question lay, we may justly suppose, that the Roman *Judices* and English Jury were of the same Use and Designation in the Roman State and in our—and for that Reason we may conclude, that the *English Jury* was formed upon the Plan of the Roman *Judices*. In *Eushel's Case* it was resolved by all the Judges upon a full Conference, as Chief Justice Vaughan tells us in his Reports, p. 135. that a Jury is not finable for going against Evidence where an Attaint does not lie;—and one Reason there given is, *that the Judge cannot fully know upon what Evidence the*

Jury give their Verdict; for they may have other Evidence than what is given in Court; they are of the Vicinage, the Judge a Stranger — they may have Evidence from their own personal Knowledge of the Fact, of the Character of the Witnesses, or of their being stigmatized and infamous.

It was an antient Custom, from whence it becomes the Law of England in some Cases, not to allow a *Jury Meat and Drink, Fire or Candle*, &c. first Institute Coke, p. 227. to which the Bailiff attending is sworn. — This is commonly supposed to be intended for Dispatch, and causing the Jury to agree soon in their Verdict. But this Part of our Law was built upon a much more interesting Reason. It takes its immediate Rise from a Law of the *Longobardi* or *Goths*, who settled in that Part of Italy, from them now called *Lombardy*:— *Ut judices jejuni causas audiant et decernant* — that a Jury should bear and determine Causes without breaking their Fast. And in the *Capitularies* (*Capitular. Caroli*) it is provided, *nullus ebrius suam causam in mallo, i. e. judicio possit inquirere, nec testimonium dicere, nec placitum Comes habeat nisi jejunus* — No Man in Liquor shall plead his Cause in Court, nor give Testimony — Nor shall the Comes or chief Magistrate of the District hold Pleas, but fasting, i. e. in the Morning. The Reason for this Caution was owing to the Intemperance of the northern Nations, when they came into the southern Climates, and tasted such Liquors as before they had been unacquainted with; it was therefore prudent to restrain them from any Repast till they had done their Business, lest it might have a bad Effect upon their Decisions; they were therefore required by the Law, to come *fasting*, or at least not to drink after being impannelled. This likewise was the Reason, I conjecture, why by the Welsh Laws of *Hoel-dda*, No Cause

Cause was to be brought on after Mid-day, i. e. only in the Morning, when Men are most likely to be sober and serious. — Respondere non teneor post Meridiem—I am not obliged to answer in the Afternoon.*

This and the Gothic Practice above mentioned, besides being the natural Effect of Prudence, seems to have taken its Origin from the Roman Custom of doing no judicial Business after Dinner. — The usual Time of their *cæna* or Dinner; (though we improperly render *cæna* by Supper) was at three of the Clock in the Afternoon; *Accubueram*, says Cicero, ad Attic. 9. 26. *hora nona. I sat* (or lay) *down to Dinner at the ninth Hour*; which (reckoning six in the Morning to be the first Hour of the Day, as it was in their Computation) answered to our three of the Clock in the Afternoon. This was the Time of their *cæna*, so called from the Greek Word *κοινω*, because it was the common Meal of the whole Family; and from this *cæna*, the Welsh, by their long Intercourse with the Romans, learned to call their Dinner *ciniaw*. From this *hora nona*, or the Dinner-time of the Romans, we may learn the Meaning of our Word *Noon*. It was a Custom in the antient Monasteries not to have their general Meal till after the Evening Service, from whence they went to Dinner; this Dinner was at three of the Clock, *hora nona*, from whence they used the Word *Noon* for the Time of Dinner, and after *Noon* for after Dinner; but the Time of fasting till three of the Clock, from the Morning Service at six, after which they ate their Breakfast, being found inconvenient, they changed the Time

* *Hæc est causa debiti inter fidejusserem et debitorem ideoque respondere non teneor post meridiem, cum nulla causa post meridiem orari debet. Leges Wallicæ, lib. v. § 48.—Again, Si meridies præterlapsus, causa ampliatur in diem crastinum. Id. lib. v. c. 2.*

of Dinner from *bora nona*, or three of the Clock, to twelve or Mid-day; which still retained the Name of *Noon*, although the Reason for using that Term at first was discontinued. The antient Britons or Welsh likewise called three o'Clock or Noon by the same Word — *gwedi nawn*, after Noon or the ninth Hour; *naw* in that Language signified nine, and *nawn* the ninth; plainly from the Latin *novem* and *nona*. See *Leges Wallicæ*, lib. iii. c. 5. sect. 11. § 4. And here we may observe, as we pass, that the British or Welsh Language now in Use, is composed at least one Half of pure Latin Words; owing to that Intercourse and Participation of Law which they had with the Romans from the Time of Claudius to the Time of Honorius, when they left the Island.—But to return.—The usual Time of the Family-Meal among the Romans was three of the Clock, or *bora nona*; and the Courts where special Business might arise, were not to sit longer than *decima bora*, or *four in the Afternoon*, within which Time all Persons concerned were required to appear, and the Jury were not obliged to give their Verdict before.—Verres, when Prætor in Sicily, would have forced the *Judices* or Jury to find one Heraclius guilty in his Absence; to which they answered, they hoped he would not compel them to give their Verdict against the absent Man before four o'Clock, by which Time he possibly might appear—*Nec cogat ante horam decimam de absente, secundum præsentem judicare*, Verrin. lib. ii. Robertellus de *Judiciis*, and other Writers on that Subject observe, that *bora decima*, i. e. *4ta post meridiem demissum judicium*, that at four of the Clock a Trial, if not ended, was adjourned; and *post decimam horam nulla nova relatio*, after that Hour no new Cause was to come on.

This *Adjournment of a Cause* we find mentioned in Cicero's Oration for Balbus, — who being a Foreigner, was made free of Rome

by

by Pompey, to which Objection was made. At the Trial of Balbus, he was defended by Crassus, Pompey, and Cicero, who speaking last, observes how gracefully, learnedly and ably Pompey had defended his Client Balbus the Day before — *Quæ fuerit hesternæ die Cn. Pompeii gravitas in dicendo, judices, quæ facultas, quæ copia, &c.* Cic. pro Balbo ad init. Whence it appears, that this Cause was heard in Part the Day before, *hesternæ die*; and after Pompey had spoke to the usual Time of the Court's breaking up, which was *ad decimam horam*, it then was adjourned to the next Day, when Cicero proceeded in it. Hence undoubtedly the Welsh learned the above mentioned Custom in their Law Proceeding — *Si meridies præterlapsus — causa ampliatur in diem crastinum*. Plutarch in his *Quæstiones Roman.* observes, that *ἡμεσημέρια περὶ τοῖς πολλοῖς τὰτε δημοσίᾳ καὶ σπουδαίᾳ πράττειν*, that no public Business of any Importance was taken in Hand after what he calls *Mid-day*; that is, the Time of Repast. — And Seneca *de tranquillitate animi ad fin.* makes the like Observation — *Majores nostri*, says he, *novam relationem post horam decimam in senatu fieri vetabant* — our Ancestors would not suffer any new Business to come on in the Senate after four o'Clock.

By all which it seems to have been designed, that all judicial Business, and the Determination of Matters of Consequence, should be finished before the Hour of Repast, lest the Indulgence of their Appetites, and perhaps Intemperance, might render them incapable of making a clear and just Judgment upon the Matters before them; for which Reason, in judicial Cases, the Hour was altered from three to four, after which Time no Business was to be done that Day. So that here was a Provision for Refreshment, but

not till the Business of the Day was over, and even that not till an Hour after the usual Time of Dinner, in order to give the Court all reasonable Space to finish their Cause in, consistent with the natural Calls for Food and Sustenance in the Jury. This *Morning Part of the Day*, as best suited and fittest for all kinds of Business, where the Mind is engaged, Pliny, in his Panegyric to Trajan, calls *serias partes dierum, the serious Part of the Day*. By which is meant, that Part of the Day, when the Body, generally speaking, is not sated and depressed with Fullness, and consequently the Mind more active and vigorous. Thus in the Case of Marriage, no Contract was good that was made in *Taverns, aut nisi jejuna saliva*, i. e. in the Morning, as provided by a Canon of a Synod held at Winchester, An. 1308, in these Words, *Item quia in personis ebrüis, legitimus non dici debet consensus, inbibemus, ne in tabernis per quæcunque verba, aut nisi jejuna saliva, vir aut mulier de contrahendo matrimonia sibi invicem fidem dare præsumant*. Wilkin's Concil. t. 2. p. 295. Hence we learn the Origin of the Custom in our Church of marrying before twelve o'Clock at Noon, and the Reason for the Canon in that Case provided; and as Marriage was a solemn Act that required serious and sober Consideration, so likewise the Solemnity of an Oath among the Romans was to be proceeded upon in the Morning, when the Mind was calm, and not discomposed with Wine.—Hence we are to explain that Passage in Horace, Ep. 19. lib. ii.

—————*Forum putealque Libonis*

Mandabo ficcis.—————

This Puteal of Libo was a kind of Altar, in Form of a Cover of a Well, whence it had its Name, erected in the Forum, where the
Prætor

Prætor sat in Judgment, and Oaths were publicly administered in the Morning only; — the Form of it is to be seen on the Reverse of a Medal of Libo in Agostini sopra le Medaglie Dialogo, 4to. For these Reasons, we see the Wisdom of those Nations where Juries were used, provided against any Inconveniencies that might attend any the least Approach to Intemperance before the Delivery of the Verdict. — It is to be observed, that as the Word *Judices* in the Leg. Longobardiæ confessedly stands for a Jury, it is probable they retained it in that Signification from the Romans with the Institution; and the Use of the Word in after Ages in that Sense, is a presumptive Proof that in judicial Proceedings it signified a Jury among the Romans. And as the Longobardian Goths used the Word *Judices* for their Jury, so in the Salic Law the Franks retained the same Word in the same Signification from the Roman Law. Hence the French use the Word *Juges* for what we call a Jury.

M. Montesquieu de l'Esprit des Loix, says, *pour qu'on puisse bien entendre ce qui concerne les jugemens dans les Formules, les Loix des barbares, et les Capitulaires, je dirai que les fonctions du Comte, du Gravion, et du Centenier, étoient les memes; que les Juges, les Raithimburs et les Echevins étoient sous differens noms, les memes personnes. L'étoient les adjoints du Comte, et ordinairement il en avoit sept, et comme il ne lui falloit pas moins de douze personnes de juger, il remplissoit le nombre par des Notables.* — Tom. iii. lib. xxx. c. 18. — In order to understand what relates to Trials in the Formule, the Laws of the Barbarians and the Capitularies, it is to be observed, that the Duty and Office of the Count, Grave, and Chief of the Hundred, was the same; that the Jury, (*juges*) Raithimburs and Echevins, were the same Persons; that they were Assistant to the Count, and usually consisted of seven; but as twelve

were necessary to make a Jury, (*jurer*) he filled up the Number out of the Notables. — These Notables were the same as the *noti* of the Romans, the *gwyrr nod* of the Britons, and the *boni homines* of Marculph. Of whom see Du Cange, Glossar. *Boni Homines*, and whom we call in our Jury at this Time good Men and true.

Hence we may observe, that in the Judicature of the Franks, the Jury were called *Juges*, *Judices*, *Judges*; and that these were a kind of Jury from their being the same as the *Raithimbures*, who had their Name, like the *Raithwr* of the Britons, from *Rath*, *Justice*, which was from *Rectum*, *Right*. See p. 81. — These *Raithimbures* were in Number seven, as the Scotch Jury before mentioned, and that of Ethelred, (which consisted of an odd Number;) these seven upon a Trial were increased to twelve, the Number of our Jury under Alfred. — The Fact which M. Montesquieu seems here to have had but a dark and confused Idea of, in Truth was this: — The Count, Grave, or Chief of the Hundred, presided on the Bench; and the *Juges*, Judges or Jury, or *Raithimbures*, were the Jury first of seven, and afterwards increased to twelve, like our Jury in England. — He observes further, that whatever was the Jurisdiction of the King, Count, Grave, or other Lords, they could not give Judgment alone, i. e. as I understand it, by meer Will and Pleasure, without a Jury; — which Usage, says he, drew its Origin from the Forests of Germany; and therefore we may conclude, that these *Raithimbures* or Judges were a Jury, or kind of Compurgators, brought indeed from the Forests of Germany, but first introduced there by the Roman Colonies. In order to know what he means here by the *Juges* and *Raithimbures* being the same, and who they were, and what their Office or Duty, it may be pro-

per to compare what he says, liv. xxviii. chap. 27. where he observes, that these *Juges* were *hommes de fief*, *Homagers of the Fee*, and that they were called *Paires*, *Peers*. Whence we may collect, that *Juges*, *Raithimburges*, *Hommes de fief*, and *Paires*, all signified among the Franks one and the same Body of Men, whom we call a *Jury of Peers*. — Where therefore we retain the express Method of Proceeding in our *Juries*, which the Romans used in their *Judicia*, at least in the Instances above mentioned, we have all the Probability and Reason imaginable to conclude, that we retained in Britain the Practice of *Juries*, such as they are at this Day with regard to the general Institution, from the like Practice in criminal Cases among the Romans, which among other Parts of their Laws was first introduced into this Country by their Conquests and Colonies settled here, an essential Part of which was the Use of their own Laws and Customs, as is mentioned before, p. 140, 141, &c.

There is another Instance of Resemblance between the *Judices* of the Romans and the English Jury, relating to their Non-appearance upon Summons, and the Court granting *Essoin* upon reasonable Cause; but this having been touched upon before, p. 129, 130. the Reader is referred thither. — I shall only observe further, because it has some Relation to the Subject, that where the *Judex Citatus*, or *Jury Man*, did not attend upon Summons, and sent no Excuse, he was mulcted a *Sheep*. Gellius, lib. ii. cap. 1. gives us the Form of the Condemnation out of Varro. — *Marco Terentio quando citatus neque respondit, neque excusatus est, ego unum ovem multam dico.* — As *Marcus Terentius* hath not answered to his Summons, nor brought an Excuse, I mulct him one Sheep. We may take Notice, that all *Mults* originally were of *Cattle*, because the Riches of antient Times con-

sisted in them; and when Gold and Silver came to be used in Exchange, the *Mult* of an Ox was valued at one hundred Asses, and a Sheep at two. Hence Money was called *Pecunia*, from *Pecus*; not because Servius Tullius (as was supposed by the Antients) first stamped Metal with the Figure of a Bull, or Ox, or Sheep, but because their Riches consisted in *Cattle*. — Hence perhaps we may find the Origin of the Word *Multa*, used by the Romans for a *Fine*. We are told by Festus that *Multa* was an *Oscan* Word, by others that it was a *Sabine* or *Samnite* Word; by which is to be understood that it was a Word of the antient Language of Italy, which was originally Eastern, and for the most Part Chaldean, as appears from the Etruscan Tongue yet remaining in Inscriptions.

Now in the Chaldean Dialect a *Sheep of the finest Wool* was called מלת *melat*, from whence the Greek *μηλον*, for a Sheep, and as the *Mult* generally consisted of *Sheep*, the Reader, if he pleases, may derive *multa* from מלת a Sheep, at least till he can find a better Etymology; he may however observe to the present Purpose, that Gen. xxxiii. 19. Jacob is said to have bought a Parcel of a Field of Hamor, Sechem's Father, for a *hundred Pieces of Money*, which in the original Hebrew is *one hundred Lambs*.

As to what relates to the Law of Juries, with the Doctrine and Rights attending them, I shall refer the Reader to the Law Books, and particularly to the *Trials per pais*, where he will find every thing relating to the Law of Juries and Jurors fully explained. The Design and Intention of this present Tract being only to shew, That the Principles and Institution of a Jury were not merely local, nor the accidental Growth of any particular Nation or Climate, but were founded

in

in Nature itself, and those original Rights of *uncontrouled legal Liberty of Person*, and *undisturbed Possession of Property*, which distinguish the Rational from the Brute Creation:— That it was a Policy which the Wisdom of the Antients learnt out of the Book of Nature, and cultivated as a *Protection for Innocence*, and a *Guard and Defence of every Rank of Citizens*, against the *Villainy of the Profligate*, and the *overbearing and dangerous Power and Oppression of the Great* *. That for this Reason, and with this View, the wisest and most civilized States adopted it into their Republics. — This was the Origin and Use of the *Δικασται* or Jury among the Athenians †: This was the Design of the Institution of the *Judices* among the Romans; this is the End and Use of a *Jury* in the English Constitution.

It may perhaps be objected, that if the *Judices* addressed by the Roman Orators in their Speeches at the Bar signified the same Institution which we call a *Jury*, and which is here supposed to be derived from them, we should find some mention of it as such in the Books and Practice of the Roman civil Law; but as not the least Remains of it are discoverable there, it is to be presumed they knew nothing of it, and that no such Institution was ever received in the Roman Polity. — To which it may be answered, that the Pandects of the Roman Civil Law contain chiefly the Laws, Constitutions and Edicts of the *Emperors*, who, from the Time of the *Lex Regia*, by which Augustus was vested with the Means of Arbitrary Power, took every Method, and laid hold of every Opportunity to establish

* In præsidium innocentie constituti judices. — Cic. pro P. Sylla, ad fin. — Contra periculosissimas hominum potentias conditionis omnium civium providisse judices videamini. — Id. pro Cælio.

† Δικαιοσύνη των δημοῦ παύσαι. Aristot. Politic. lib. ii. c. 12.

the Will of the Prince as the only Law. — No Wonder then, that a Provision in Favour of Liberty and natural Justice, introduced first into the Democracy of the Athenians, and thence cherished under the Republic of Rome, should by Degrees be discouraged, neglected, and at last laid aside with that Republic by the Emperors, whose only Aim was to make the *Prince absolute*, his Will the only Rule of Law, and the Decisions of his Creatures the only Resource of Justice. — This was the Reason why no Remains of the Judgment by the *Judices* appear either in the Books or Practice of the Roman Civil Law. — This was the Reason why those Kings of England who fought Power above Law, and therefore were no Friends to Juries, always endeavoured to introduce the Civil Law into the Government of this Kingdom, as favourable to Despotism. This was the Reason why the Bishops endeavoured at the Parliament of Merton to legitimate Bastards by the Law of England, according to the Practice of the Civil and Canon Law, in order by Degrees to accustom the People of England to bear arbitrary Power in the State as well as the Church. — But it may be asked, how came it to pass, that the Bishops, who used before to make what Laws they pleased in their Synods, and enjoin what Constitutions they thought proper even under a Curse (as those of the Council at Lyons some time before, and the Refusal to grant the King any Aid, *papa inconsulto*, and all this and much more without any Regard first had to Parliament) should in this Case be so humble as to apply to Parliament for what at another time they would not scruple to do by their own Authority. — The Motive to this Condescension was a Writ of Inhibition from the King two Years before, 18 Henry III. to the Bishops. Firmiter inhibendo, quod sicut Baronias quas de rege tenent, diligunt nullo modo præsumant concilium tenere de aliquibus quæ

quæ ad coronam regis attinent, vel quæ ad personam regis vel statum suum vel statum concilii sui contingunt quod si fecerint Rex inde capiat se ad Baronias suas: — Rot. Parl. 18 Hen. III. Num. 17. This Observation may serve as a Comment upon that Act, *falsely* so called, because there is no enacting Clause in it, and it is only a Relation of what passed in the House upon that Question.

I have thus endeavoured to shew, that the great Bulwark of *legal Liberty*, a Jury, originally founded in Nature, was thence first reduced into a political Institution under the Grecian Democracy, thence copied into the Roman Polity, from whence it is most probable it was derived into the Saxon and English Constitution. In the Management of which new Argument, I have proceeded upon Principles undeniably true, and Authorities of the ablest Writers of Antiquity, both Grecian and Roman, to prove what seems to be the main Point in Question, which is, that the *Δικασται* addressed in their Speeches by the Grecian, and the *Judices* by the Roman Orators, were a different Order of Men from the *Presidents and Judges of the Bench*, and their Office in the State as distinct as that of *Judge* and *Jury* in our Polity. The Proofs of which are interspersed through the whole in their proper Places, which, joined with the other Circumstances corresponding with the Usages and Customs belonging to an English Jury, taken Notice of likewise in the Course of the Argument, may induce the learned Reader to believe that the *δικαστηριον* of the Greeks, the *Judicium* of the Romans, and the *Jury* of the Saxons and English; were in Principle, Intention, and Effect, the same; and that the *English Jury* was an Imitation of the Roman *Judicium* brought into their Northern Conquests, as the *Judicium* and *Judices* of the Romans was a Transcript of the *Δικαστηριον* or Trial by

by Jury among the Greeks. If he be of this Opinion, he will have Opportunity of filling this Out-line with such further Observations as may occur in reading the Greek and Roman Orators, and which cannot be expected here in its full Extent, in a first Essay upon a Subject, which combats a received Opinion, and which perhaps has never been considered in this Light before.—But be that as it may; what is here advanced is submitted with great Deference to the Correction of abler Hands.



F I N I S.